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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted] 164

PERMIAN BASIN PIPELINE COMPANY,
a Corporation,

Appellant,

v.

RAILROAD COMMISSION OF TEXAS and
THE ATLANTIC REFINING COMPANY,
a Corporation,

Appellees.

ON APPEAL FROM THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

JURISDICTIONAL STATEMENT

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May, 1958.

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RAILROAD COMMISSION OF TEXAS and
THE ATLANTIC REFINING COMPANY,
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Appellees.

ON APPEAL FROM THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

JURISDICTIONAL STATEMENT

Appellant appeals from the final judgment of the Court of Civil Appeals, Third Supreme Judicial District of Texas, at Austin,[1] entered on April 17, 1957, reversing a judgment of the District Court of Travis County, Texas, 98th Judicial District[2] which adjudged an order of the Texas Railroad Commission[3] to be void and illegal and permanently enjoined enforcement thereof. Application for writ of error to the Supreme Court of Texas was refused on October 9, 1957 and appellant's motion for rehearing on said application was overruled on November 27, 1957. This Statement is submitted to show

1 Hereinafter referred to as the "Court of Civil Appeals."
2 Hereinafter referred to as the "District Court."
3 Hereinafter referred to as the "Railroad Commission."

that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the Court of Civil Appeals is reported at 302 S. W. 2d 238. No opinion was rendered by the District Court. The Orders of the Railroad Commission involved in this proceeding are unreported.[4] Copies of the Judgment and Opinion of the Court of Civil Appeals are attached as Appendices A and B, respectively, and a copy of the Final Judgment of the District Court is attached as Appendix C.

JURISDICTION

This action was brought in the District Court by appellant against the Railroad Commission under Article 6049a, Section 12,[5] Vernon's Annotated Revised Civil Statutes, to review and set aside orders of the Railroad Commission, having the force of statutes,[6] declaring Permian to be a "common purchaser" of gas in the Puckett-Ellenburger Field of Texas and requiring it, *inter alia*, to make all of its facilities available to and to purchase gas, without discrimination as to price or other terms and conditions, from all producers offering it for sale in such field (App. B, p. B-20).

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4 Such Orders are set forth verbatim in the Opinion of the Court of Civil Appeals. See pp. B-5 to B-26, Appendix B.

5 Statute set forth in Appendix D hereto.

6 West Texas Compress & Warehouse Co. v. Panhandle & S. F. Ry. Co., (Texas Com. Appeals), 15 S. W. 2d 558, 560, holding that "Since the [Railroad] Commission is an instrumentality of the state, exercising delegated powers, its orders are of the same force as would be a like enactment by the Legislature." [Bracketed word added.] See also, Hamilton v. Regents of the University of Calif., 293 U. S. 245, 55 S. Ct. 197; Live Oak Water Users' Ass'n v. Railroad Commission, 269 U. S. 354, 46 S. Ct. 149.

The judgment of the District Court, setting aside and permanently enjoining enforcement of said Railroad Commission orders, was entered on January 18, 1957. The Court of Civil Appeals, by opinion and judgment dated April 17, 1957, reversed the judgment of the District Court and dissolved the injunction. The Supreme Court of the State of Texas, on October 9, 1957, refused to grant appellant's application for writ of error and on November 27, 1957 overruled appellant's motion for rehearing on said application for writ of error. Notice of Appeal was filed in the Court of Civil Appeals on February 24, 1958.

Due to unavoidable delay in preparing and certifying the record, Permian made application (R. 644-645) for and was granted an extension of time (R. 646) to May 12, 1958, in which to docket the case in this Court. The jurisdiction of the Supreme Court of the United States to review this decision and final judgment of the Court of Civil Appeals is conferred by Title 28 United States Code, Section 1257(2), 62 Stat. 929.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment in this case:

Phillips Petroleum Company v. State of Wisconsin, 347 U. S. 672, 74 S. Ct. 794.

Natural Gas Pipeline Company of America v. Corporation Commission of the State of Oklahoma, et al., 349 U. S. 44, 75 S. Ct. 578.

Cities Service Gas Company v. State Corporation Commission of Kansas, No. 85, Oct. Term, 1957, —— U. S. ——, 78 S. Ct. 381.

Phillips Petroleum Company v. The Corporation Commission of the State of Oklahoma, et al., No. 111, Oct. Term, 1957, —— U. S. ——, 78 S. Ct. 409.

STATUTES INVOLVED

The material and essential provisions of Railroad Commission Order No. 8-34,332[7] are as follows:

> * * * That Permian Basin Pipe Line Company, purchaser of gas from the subject field, is declared by the Commission to be a common purchaser of gas from the field, that all facilities furnished for one producer will be furnished to all other producers so that each producer will be afforded the opportunity to produce and market without restraint his ratable share of gas as determined by the Commission, that it will be the duty of said common purchaser to comply with any regulation deemed advisable and adopted by the Commission to assure ratable take from said field.

The Texas Common Purchaser Act, Article 6049a, Sections 8-12, Vernon's Annotated Revised Civil Statutes, material portions of which are set forth in Appendix E, is also involved in this case. Such Act provides, in part, as follows:

> Section 8a. * * * every * * * gas purchaser * * * purchasing, or taking, natural gas * * * shall be a common purchaser thereof, and shall purchase, or take, such gas under such rules or regulations as may be prescribed by the Commission, in the same manner, under the same inhibitions against discriminations and subject to the same provisions as are herein set out with respect to common purchasers of oil.
>
> Section 8b. It shall be the duty of the Railroad Commission of Texas to see that the provisions of this Act are fully complied with, and it shall have the power, * * * to make rules, * * * defining the distance that extensions or gathering lines shall be made to all oil or gas wells; * * *
>
> Section 11d. The Railroad Commission shall make inquiry in each field concerning the connections of

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7 See pp. B-12 to B-21, Appendix B.

> the various producers and when discrimination is found to be practiced by any common purchaser * * * said Railroad Commission shall issue an order to such common purchaser to make such reasonable extensions of their lines and such reasonable connections as will prevent such discrimination.

Also involved herein are pertinent provisions of the Natural Gas Act, 15 U. S. C. §§717, *et seq;* 52 Stat. 821, *et seq.*, attached hereto as Appendix F; and, the Constitution of the United States, Article I, Sections 8 and 10, and Amendment XIV, Section 1, attached hereto as Appendix G.

QUESTIONS PRESENTED

Appellant, Permian Basin Pipeline Company, a "natural-gas company" under the Natural Gas Act, and a private purchaser, processor and interstate carrier of natural gas, contracted to purchase specific volumes of gas from two producers in the Puckett-Ellenburger Field in Texas. Such producers are "natural-gas" companies and the sales, which are in interstate commerce for resale, are subject to the exclusive jurisdiction of the Federal Power Commission as to price and all other terms and conditions. The gas, as produced, is not, because of its high carbon dioxide (CO_2) content (28%), marketable by Permian until processed in its facilities, the capacity of which is limited to the volumes of gas provided for under said contracts. The Railroad Commission, under the Common Purchaser Statute,[8] ordered Permian to

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8 In the only other case in which the Railroad Commission has ever attempted to declare an interstate pipeline company a "common purchaser" under this statute, a three-judge federal court held such statute unconstitutional as interfering with and burdening interstate commerce. **Texoma Natural Gas Co. v. Railroad Commission of Texas**, 59 F. 2d 750. This Court recognized such fact in **Thompson v. Consolidated Gas Utilities Corporation**, 300 U. S. 55, 57 S. Ct. 364.

"*purchase*" or "*take*" volumes of gas from such producers different from the contractual volumes and, further, ordered Permian to make all of its processing and pipeline facilities available to, and to purchase gas, without discrimination as to the price and other terms and conditions, from all producers offering it for sale in such field. The questions presented by this appeal are as follows:

> 1. Whether, under such facts, the action of the State in exercising jurisdiction over the processing and pipeline facilities of an interstate pipeline company and in regulating sales and purchases between natural-gas companies of natural gas transported and sold in interstate commerce for resale, is void as in conflict with the Natural Gas Act.[9]
>
> 2. Whether, under such facts, the action of the State in converting a private purchaser, processor and interstate carrier of gas, operating under private contracts, into a common purchaser, processor and interstate carrier of gas, impairs the obligation of contracts and deprives Permian of its property without due process of law, contrary to the Constitution of the United States, Article 1, Section 10 and Amendment XIV, Section 1, respectively?

STATEMENT

Appellant, Permian Basin Pipeline Company,[10] is a corporation engaged in the transportation of natural gas in interstate commerce and the sale in interstate commerce of natural gas for resale for ultimate public consumption and is, therefore, a "natural-gas company"

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9 If this appeal is allowed, Permian reserves the right to present and argue the following question: Whether, under the foregoing facts, the action of the State constitutes an unlawful burden on interstate commerce, contrary to Section 8, Article I of the Constitution of the United States?

10 Hereinafter referred to as "Permian."

within the meaning of the Natural Gas Act, 15 U. S. C., §717 *et seq.* (R. 313-314; 342-343). Permian is a subsidiary of Northern Natural Gas Company[11] and sells substantially all of its gas to Northern (R. 313-314). Northern is also a "natural-gas company" engaged in the transmission and sale of natural gas in interstate commerce for resale. The gas purchased by it from Permian is commingled with gas from other sources and flows in a continuous and uninterrupted stream out of Texas and New Mexico, across the Oklahoma Panhandle and Kansas, into Nebraska, Iowa, Minnesota and South Dakota where it is sold by Northern for ultimate public consumption (R. 314-315). The sale of gas by Permian to Northern, and the operations of both companies, are regulated by the Federal Power Commission under the Natural Gas Act (R. 315).

Phillips Petroleum Company[12] discovered gas in the Puckett-Ellenburger Field in Pecos County, Texas, in July, 1952 (R. 80), and now has 13 producing wells in such field (R. 164). The field is a very large one with estimates of recoverable gas running as high as three trillion cubic feet (R. 82-83). Such gas has, however, a carbon dioxide (CO_2) content of approximately 28% (R. 38), is highly corrosive and quickly destroys steel pipes and other metals (R. 90, 298). Such gas is not, therefore, marketable by Permian in its natural state (R. 90, 298).

Phillips sought to sell such gas in its natural state but was unable to do so (R. 117). It was reluctant to spend the amount of money required to construct a CO_2 removal plant and, therefore, endeavored to find

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11 Hereinafter referred to as "Northern."

12 Hereinafter referred to as "Phillips."

someone who would build such a plant and purchase the remaining gas after the CO_2 was removed (R. 94). Phillips offered such gas to Permian, which was already committed, under a contract dated February 8, 1952, to purchase certain volumes of gas from Phillips in this general area (R. 323-324).

Because the Federal Power Commission indicated that Permian needed more gas reserves before a certificate of public convenience and necessity would be issued authorizing the construction of Permian's pipeline system (R. 315-316), Permian finally agreed to build the CO_2 plant and purchase this gas from Phillips (R. 324). Permian agreed to purchase from Phillips an initial volume of 25 million cubic feet of "pipeline gas" (i. e., processed gas from which the harmful CO_2 has been removed) per day at 15¢ per thousand cubic feet (Mcf) and Phillips agreed to reimburse Permian, up to a maximum of 5¢ per Mcf, for the cost of extracting CO_2 from the gas.

Permian thereafter, at a cost of $3,900,000 (R. 168), built a plant known as the Mitchell CO_2 plant, and initial deliveries of gas began on February 18, 1954 (R. 325). The plant was built with a capacity of 25 million cubic feet of "pipeline gas" per day. In order to produce this volume of "pipeline gas," approximately 44 million cubic feet of raw gas must be processed through the plant each day (R. 325-326).

Since the CO_2 content of natural gas seldom exceeds 3%, Permian was pioneering in attempting to process a large volume gas stream containing 28% carbon dioxide (R. 118-119). The plant was extremely costly and operational difficulties numerous (R. 110-111; 325).

The cost of treating the gas proved to be 9.86¢ per Mcf, whereas Phillips agreed to reimburse Permian up to a maximum of only 5¢ per Mcf (R. 289; 302). Thus each Mcf of gas costs Permian 4.86¢ more than contemplated under the contract.

On January 20, 1956, Permian and Phillips amended their basic contract to provide that Permian would enlarge the Mitchell CO_2 plant so that it could purchase 95 million cubic feet of "pipeline gas" per day from Phillips (Phillips' Orig. Ex. No. 4).

For more than 1½ years after the Mitchell plant was put in operation, Phillips was the only producer in the Puckett-Ellenburger field. On April 26, 1955, Permian and Houston Oil Company[13] entered into a contract whereby Permian would purchase gas from acreage held by Houston in such field (Phillips' Orig. Ex. No. 14). The terms of such contract were essentially the same as the Permian-Phillips contract. Permian made it clear, however, that the then-existing capacity of the Mitchell CO_2 plant (25 million cubic feet of "pipeline gas" per day) was required to treat gas under the Phillips contract and that, *until the plant capacity was enlarged,* only relatively small amounts of gas could be taken from Houston. Article III, Section 1 of the Permian-Houston contract specifically provided that (Phillips' Orig. Ex. No. 14):

> Subject to the terms and provisions hereof, Seller agrees to sell and deliver to Permian and Permian agrees to purchase and receive from Seller, or if available and not taken, pay for that quantity of pipeline gas which will afford Seller *ratable production* over a reasonable period of time with other natural gas purchased by Permian in the vicinity of

13 Hereinafter referred to as "Houston."

> Seller's leases, computed under such equitable and reasonable formulae as Permian shall from time to time employ; provided, however, Permian shall not be required to enlarge the treating capacity of its existing carbon dioxide plant in excess of the present capacity of such plant prior to the time Permian would otherwise enlarge such capacity pursuant to the terms of the Gas Purchase Contract, dated February 8, 1952, as supplemented, between Permian and Phillips Petroleum Company; *and, provided further, that Permian's obligation to take ratably hereunder shall be subservient to Permian's obligations to Phillips Petroleum Company, pursuant to said Contract, until said plant shall be so enlarged; and, provided further, that after Permian does enlarge such plant, Permian's obligations to take ratably hereunder shall cease to be subservient to Permian's said obligations to Phillips Petroleum Company and shall be equal to all other obligations of Permian with respect to such take.* (Emphasis supplied.)

Houston began delivering gas to Permian under such contract on November 20, 1955.

In expanding its Mitchell CO_2 plant to take 95 million cubic feet of "pipeline gas" per day from Phillips, Permian designed the new plant with a capacity of 105 million cubic feet per day in order that it could take ratably from Houston as soon as possible (R. 327).[14] The total cost of the expansion has been approximately $7,000,000, making a total outlay of nearly $11,000,000 by Permian in its Mitchell CO_2 plant to make Puckett-Ellenburger field gas marketable (R. 328).

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14 Due to the many unique operational problems involved in this pioneering effort by Permian, progress has been slower than anticipated. It was not until May 6, 1958, that the Mitchell plant's designed capacity of 105 million cubic feet per day was ready for operation.

By conveyance dated June 6, 1956, the Atlantic Refining Company[15] acquired certain properties from Houston and specifically assumed Houston's obligations under the April 26, 1955 contract with Permian (R. 350-351). Almost immediately thereafter Atlantic, in complete disregard of its contract, complained to the Railroad Commission that Permian was not purchasing from Atlantic ratably with its purchases from Phillips. Such Commission, on November 1, 1956, issued its order #8-34,332 (Appendix B, pp. B-12 to B-21), declaring Permian to be (a) a "common purchaser" of gas from the Puckett-Ellenburger field; (b) requiring that all facilities furnished to one producer be furnished to all other producers in such field; and, (c) requiring it to purchase gas, without discrimination as to price and other terms and conditions, from all producers offering it for sale in such field.

To obey the order of the Railroad Commission, Permian would have to reduce its purchases from Phillips far below the volumes contemplated in the Permian-Phillips contract. On November 20, 1956, Permian notified Phillips that purchases from it would be decreased (R. 442-443). On November 21, 1956, Phillips responded stating that, notwithstanding such order, Phillips would hold Permian liable for its failure to purchase the contractual volumes of gas (R. 136).

How the Federal Questions Are Presented

On December 5, 1956, Permian filed its Petition in the District Court to review Railroad Commission order #8-34,332 and supplementary orders (R. 1-33). In such petition Permian alleged that said Common Pur-

15 Hereinafter referred to as "Atlantic."

chaser Statute and the Railroad Commission's orders thereunder were illegal, unenforceable and void for the following reasons, among others:

(1) That said Common Purchaser Act and the orders of the Railroad Commission regulating the price, terms and conditions of Permian's purchases of gas from Phillips, Atlantic and other producers are void since they conflict with the Federal Power Commission's exclusive jurisdiction, under the Natural Gas Act, 15 U. S. C., Sections 717, *et seq.*, to regulate sales in interstate commerce of natural gas for resale. (R. 13-14).

(2) That Permian's private status was changed to that of a public status by declaration of the Common Purchaser Act and the administrative fiat of the Railroad Commission, resulting in the taking of private property for public use without just compensation, contrary to the due process clause of the 14th Amendment of the United States Constitution. (R. 12).

(3) That said Common Purchaser Act and the orders of the Railroad Commission destroy rights and impair obligations of contracts, contrary to Article I, Section 10 of the United States Constitution. (R. 13).

(4) That said Common Purchaser Act and orders of the Railroad Commission interfere with and are a burden on interstate commerce, in violation of Article I, Section 8 of the United States Constitution. (R. 12).

After several days of hearings, in which Atlantic intervened and actively participated, the District Court rendered its Final Judgment (Appendix C) declaring said Railroad Commission orders void, illegal and unauthorized by law. It permanently enjoined enforcement of said orders.

The Railroad Commission and Atlantic appealed to the Court of Civil Appeals. Permian again raised and relied on all the federal constitutional and statutory provisions which it had put in issue in the District Court. The Court of Civil Appeals, in an opinion (Appendix B) and Judgment (Appendix A) dated April 17, 1957, reversed the District Court and dissolved the injunctions. After admitting that it did not review the evidence in detail, the court rejected Permian's arguments respecting federal constitutional and statutory issues with the summary and sweeping declaration (App. B, p. B-39):

> We do not believe that the orders encroach upon Federal jurisdiction, and do not unduly burden interstate commerce, if enforced, and that the State has regulatory powers.

On June 10, 1957 Permian filed its Application for Writ of Error in the Supreme Court of Texas, where Permian again raised all federal constitutional and statutory issues which it had relied upon in the lower courts (R. 523-615). The Supreme Court, by notice dated October 9, 1957, refused to grant said application for writ of error (R. 632). On November 27, 1957 the Supreme Court of Texas overruled Permian's motion for rehearing on such application (R. 632).

THE QUESTIONS ARE SUBSTANTIAL

This case presents unique, serious and far-reaching questions involving the power of a state to assert jurisdiction over purchases, operations and facilities of a private interstate pipeline company which, by reason of federal constitutional and statutory provisions and adjudicated cases, have heretofore been removed from the province of state regulation and control. Since these questions involve distinct areas of the law, to-wit, the

conflict of federal and state regulation and the protection of private contractual and property rights, the substantiality of these questions will be presented separately.

I. Conflict of Federal and State Regulation

The action of the Railroad Commission herein, as upheld by the Court of Civil Appeals, constitutes a definite and direct invasion of the field of jurisdiction delegated to the Federal Power Commission under the provisions of the Natural Gas Act. Permian does not contend that the state may not, by *proper* means, regulate the production and gathering of natural gas.[15] State regulation must, however, be accomplished by means other than the regulation of sales and purchases in interstate commerce for resale. *Cities Service Gas Co. v. State Corp. Com'n of Kansas*, —— U. S. ——, 78 S. Ct. 381; *Phillips Petroleum Co. v. Wisconsin*, 347 U. S. 672, 680-681. Throughout this litigation Permian objected to the Railroad Commission's action on the basis that it invaded areas of jurisdiction specifically granted to the Federal Power Commission under the Natural Gas Act, to-wit, jurisdiction over sales of natural gas in interstate commerce for resale; over facilities used in making such sales; and, over certain activities of the parties involved in such sales.

Phillips, Atlantic and Permian are all "natural-gas" companies under the Natural Gas Act. The sales of gas by Phillips and Atlantic to Permian in this case are subject to rate regulation under Sections 4 and

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15 On the contrary, Permian is fully cognizant of the provision of Section 1(b) of the Natural Gas Act, 15 U. S. C. §717(b) which denied to the Federal Power Commission control over the "production or gathering of natural gas." Sales in interstate commerce for resale by producers to interstate pipeline companies do not, however, come within the "production or gathering" exemption. **Phillips Petroleum Company v. Wisconsin, 347 U. S. 672, 680-681.**

5 of the Natural Gas Act. The Gas Purchase Contracts between Phillips and Atlantic and Permian have been filed with the Federal Power Commission as Rate Schedules (Permian's Orig. Ex. Nos. 12, 14), and the provisions thereof are subject to the exclusive jurisdiction of such Commission. Certificates of public convenience and necessity have been issued by such Commission, under Section 7 of such Act, authorizing such sales and the operation of facilities used in making such sales (Permian's Orig. Ex. Nos. 13, 15). The resale of such gas by Permian to Northern is made under a certificate issued by, and pursuant to a rate schedule on file with, the Federal Power Commission.

Against this background of complete and exclusive regulation by the Federal Power Commission of the matters and parties involved herein, consider the effect of the Texas Common Purchaser Act and the Railroad Commission's orders issued thereunder. The Common Purchaser Act provides, in pertinent part (App. E, pp. E-1, E-2):

> "* * * every * * * gas purchaser * * * purchasing, or taking, natural gas * * * shall be a common purchaser thereof, and shall purchase, or take, such gas under such rules or regulations as may be prescribed by the [Railroad] Commission, in the same manner, under the same inhibitions against discriminations and subject to the same provisions as are herein set out with respect to common purchasers of oil" (bracketed material added), Art. 6049a, Section 8a, V. A. C. S.[16]

16 As heretofore noted (footnote 8, p. 5, supra), in the only other case in which the Railroad Commission has ever attempted to declare an interstate pipeline company a "common purchaser" under this statute, a three-judge federal court held such statute unconstitutional as interfering with and burdening interstate commerce. **Texoma Natural Gas Co. v. Railroad Commission of Texas**, 59 F. 2d 750. This Court recognized such fact in **Thompson v. Consolidated Gas Utilities Corporation**, 300 U. S. 55, 57 S. Ct. 364.

Acting under this provision, the Railroad Commission and the Court of Civil Appeals have (1) declared Permian to be a "common purchaser" of natural gas in the Puckett-Ellenburger field, (2) ordered it to purchase natural gas from all producers without discrimination, and (3) required it to make all of its facilities available to all producers in the field. As hereinafter shown, each of these determinations encroach upon the domain of the Federal Power Commission.

(1) Declaring Permian a "common purchaser" requires it to "purchase" or "take" gas from all producers in the field offering it for sale.[17] Such producers, however, cannot sell such gas to Permian until the Federal Power Commission has issued a certificate authorizing the sale and accepted a rate schedule covering the price of such sale. More importantly, however, state regulation by compulsory purchase or take is *not* a regulation of production. Production is the act of bringing forth gas from the earth. *Saturn Oil and Gas Co. v. F. P. C.*, 250 F. 2d 61, 64 (CA 10, 1957), cert. den., —— U. S. ——, 78 S. Ct. 542. The event which the state here regulates is the "purchase" or "take" of gas by Permian, which is solely for interstate transmission. The gas at the time of such state-regulated event is not only actually committed to but is moving in interstate commerce. The "taking" from a practical standpoint is the "taking off" of gas in Permian's pipeline into commerce. Cf. *Michigan-Wisconsin Pipe Line Co. v. Calvert*,

17 Standard Oil Company of Texas (R. 247), Gulf Oil Company (R. 109, and a George S. Hammonds (R. 109) have recently completed wells in the Puckett-Ellenburger field. Under the Railroad Commission's orders, Permian is required to purchase gas from these and any other producers who offer it for sale.

347 U. S. 157, 164-167, 74 S. Ct. 396, 400-401.[18] The "purchase" or "take" here occurs *after* production has been completed (Cf. *Saturn*, supra, at p. 64). As such, it is subject to the exclusive jurisdiction of the Federal Power Commission. There cannot be a dual control of wellhead sales by the Texas Railroad Commission and the Federal Power Commission (See *Saturn*, supra, at p. 67). Neither is it sufficient to defeat Federal jurisdiction that in the exercise of the power of rate regulation local interests may in some degree be affected. *Interstate Natural Gas Co. v. F. P. C.*, 331 U. S. 682, 690-691, 67 S. Ct. 1482.

(2) The requirement of the Common Purchaser Act to purchase or take gas from all producers without discrimination contemplates and requires that the Railroad Commission regulate the price at which Permian now or hereafter purchases gas in this field. The Railroad Commission frankly, and we submit, fatally, admits this. In its Brief before the Texas Supreme Court such Commission flatly states(page 53):

> The Common Purchaser Act requires the purchaser to take without discrimination, that is, *to pay each producer in the same field the same price for the same kind of gas. Contracts to the contrary are invalid.* (Emphasis added)[19]

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18 In the Michigan-Wisconsin case this court held unconstitutional a tax levied by the State of Texas where the taxable event was the "taking" of gas into interstate commerce.

19 Again at p. 52 of such Brief the Commission states: "Finally, if the parties may contract as to volume and thereby preclude exercise by the Commission of the jurisdiction conferred upon it by the Common Purchaser Act, they may similarly contract with respect to price; and if they may so contract, the way is further opened to discrimination and monopoly, the very evils the Legislature sought in the public interest to prevent by enacting the Common Purchaser Act."

In view of this Court's recent (1958) decisions in the State Minimum Price cases,[20] the decision of the lower court upholding the Common Purchaser Act is patently erroneous, since, it cannot be successfully disputed that the Common Purchaser Act contemplates and requires state enforcement of *minimum* prices. This obviously conflicts with Federal Power Commission *maximum* price regulation. The Federal Power Commission has heard and rejected arguments that a regulation of the State of Mississippi,[21] the same in substance as the Common Purchaser Act here involved, binds it to a minimum price. *In the Matter of Crow Drilling Co., Inc.*, Doc. Nos. G-6622, et al., (remanded on other grounds *sub. nom. Crow Drilling Co., Inc., v. F. P. C.*, —— F. 2d ——, (CA 5, Apr. 23, 1958)), such Commission rejected the argu-

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20 **Cities Service Gas Company v. State Corporation Commission of Kansas**, No. 85, Oct. Term, 1957, —— U. S. ——, 78 S. Ct. 381; **Phillips Petroleum Company v. The Corporation Commission of the State of Oklahoma, et al.**, No. 111, Oct. Term, 1957, —— U. S. ——, 78 S. Ct. 409; **Michigan-Wisconsin Pipeline Company v. Corporation Commission of the State of Oklahoma, et al.**, No. 86, Oct. Term, 1957, —— U. S. ——, 78 S. Ct. 409; **Phillips Petroleum Company v. The Corporation Commission of the State of Oklahoma, et al.**, No. 112, Oct. Term, 1957, —— U. S. ——, 78 S. Ct. 409. This Court's decision in **Phillips Petroleum Company v. State of Wisconsin**, 347 U. S. 672, 74 S. Ct. 794, was, of course, the historic case recognizing exclusive Federal Power Commission jurisdiction over sales for resale of natural gas by independent producers. Since that decision, many U. S. Courts of Appeal have sustained Federal Power Commission jurisdiction over wellhead sales of natural gas. See, e.g., **Deep South Oil Company of Texas v. Federal Power Commission**, 247 F. 2d 882 (C. A. 5, 1957); **Saturn Oil & Gas Company v. Federal Power Commission**, 250 F. 2d 61 (C. A. 10, 1957), cert. den., —— U. S. ——, 78 S. Ct. 542.

21 Rules and Regulations of the Mississippi State Oil and Gas Board, Rule 48 provides: "Each person now or hereafter engaged in the business of purchasing oil or gas from owners, operators, or producers shall purchase without discrimination in favor of one owner, operator, or producer against another in the same common source of supply."

ment that such state regulation required it to approve a rate or price for gas that would be non-discriminatory between producers in the field involved, citing *State Corporation Commission of Kansas v. F. P. C.*, 206 F. 2d 690 (CA 8, 1953), *cert.* den., 346 U. S. 922. Based on the foregoing, very serious and substantial questions are raised respecting a state's right to in any manner control or influence the price paid by interstate pipeline companies to independent producers for natural gas.

(3) In ordering that "all facilities furnished [by Permian] for one producer will be furnished to all producers" in the field, the Railroad Commission's orders again conflict with and tread in areas subject to the exclusive jurisdiction of the Federal Power Commission under the Natural Gas Act. Under its present orders and pursuant to the broad powers conferred by the Common Purchaser Act, the Railroad Commission can require Permian to extend its pipeline system to purchase or take additional supplies of gas from other producers (App. E, p. E-4). Such Commission may, by indirection, effectively require Permian to enlarge its Mitchell CO_2 plant by compelling it to purchase or take gas from other producers. Either of these results will require Permian to invest substantial capital. In order to extend its pipeline system or enlarge the Mitchell plant, place such investment in its rate base and earn a return thereon, Permian must be prepared to show the Federal Power Commission that such project is prudent, feasible and in the public interest. The declaration of the Court of Civil Appeals (App. B, p. B-39), that, "The Federal Power Commission in fixing the rates or charges for gas made by Permian may consider as a part of its rate base the cost of the facilities used by it to remove CO_2 from Puckett-

Ellenburger gas.", albeit true, is a gratuitous assertion on the part of the court. Neither the Railroad Commission nor the Court of Civil Appeals is in a position to assure Permian that, as a matter of law, any additional investment will be placed in Permian's rate base and that the Federal Power Commission will fix rates so as to grant a fair return thereon. The Federal Power Commission is under no compulsion to follow orders of state commissions in fixing rates of natural gas companies. *State Corp. Com'n of Kan. v. Federal Power Com'n*, 8 Cir., 206 F. 2d 690, 703, 705, cert. den. 346 U. S. 922, 74 S. Ct. 307.

In view of the provisions of the Natural Gas Act giving the Federal Power Commission exclusive authority to act in those areas of the natural gas business involved in this case, viz., sales of natural gas in interstate commerce for resale, the orders under attack raised substantial questions concerning the right of a state agency to invade such areas. Even prior to the Natural Gas Act, this Common Purchaser Act was declared unconstitutional in its relation to the power of the federal government to control interstate commerce. *Texoma Natural Gas Co. v. Railroad Commission of Texas,* 59 F. 2d 750. It is submitted, therefore, that this Court should consider and rule on the merits of this case which results in dual regulation of interstate commerce by state and federal agencies.

II. Protection of Private Property and Contractual Rights

As heretofore stated, Permian is a private interstate transporter of natural gas operating under privately negotiated contracts. It constructed the Mitchell CO_2 plant, at a cost of approximately $11,000,000, in order

that it might purchase, process and transport specific volumes of gas which it privately agreed to buy from certain producers in the Puckett-Ellenburger field. The Atlantic contract expressly recognized the limited capacity of the Mitchell plant and provided that, until such plant was enlarged, Permian's obligation to take gas from Atlantic was subservient to its prior obligations under the Phillips contract (Phillips' Orig. Ex. No. 14).

The Commission's orders declaring Permian to be a "common purchaser" and requiring it to furnish its facilities to all producers in the field have nullified contractual rights and obligations and confiscated Permian's property through legislative fiat. [22]

The statement of this Court in *Thompson v. Consolidated Gas Utilities Corporation*, 300 U. S. 55, 79, 57 S. Ct. 364, a case involving a compulsory purchase order of the Texas Railroad Commission issued subsequent to *Texoma Natural Gas Co. v. Railroad Commission of Texas, supra*, is especially applicable here with respect to the sharing of the Mitchell plant:

> Our law reports present no more glaring instance of the taking of one man's property and giving it to another.

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22 A statutory three-judge federal court in **Texoma Natural Gas Co. v. Railroad Commission of Texas**, 59 F. 2d 750 (W. D. Tex., 1932), in declaring this same Common Purchaser Act unconstitutional, has already said that such Act deprives an interstate pipeline company, in all material respects similar to Permian, of its property without due process of law. The Court held, at 59 F. 2d 753, that: "The carrier's private status is changed to that of public by the declaration of the Act alone. The Legislature is without power to do this. It is taking private property for public use without just compensation, inconsistent with the due process of law clause of the Fourteenth Amendment to the Constitution. (Citing cases)."

In *Producers Transportation Co. v. Railroad Commission,* 251 U. S. 228, 40 S. Ct. 131, a California statute provided that any pipeline carrying oil was a common carrier subject to regulation by the Commission. This Court held that the pipeline in question was in fact a common carrier since it carried oil for anyone and had, therefore, devoted its property to public use. In so holding, however, this Court said (251 U. S. 230-231):

> It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers *under strictly private contracts and never was devoted by its owner to public use,* that is, to carrying for the public, the state could not, by mere legislative fiat or by any regulating order of a commission, convert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the Fourteenth Amendment. (Emphasis added)

Likewise, in *Michigan Public Utilities Commission v. Duke,* 266 U. S. 570, 45 S. Ct. 191, a Michigan statute provided in effect that all persons transporting passengers or property for hire in motor vehicles were common carriers subject to regulation by a state agency. Duke was a private carrier who operated in interstate commerce (as does Permian) under three contracts. In holding that the statute violated both the interstate commerce clause and the due process clause insofar as Duke's operations were concerned, the Court said (266 U. S. 577-578):

> Moreover, it is beyond the power of the state by legislative fiat to convert property used exclusively in the business of a private carrier into a public utility, or to make the owner a public carrier, for that would be taking private property for public use without

just compensation, which no state can do consistently with the due process of law clause of the 14th Amendment.

There can be no doubt that the Railroad Commission orders in this case impair and destroy the obligations of contracts. If Permian is subject to such Commission orders, it will be prevented from purchasing contractual volumes of gas from Phillips. In such event, Phillips has threatened Permian with a lawsuit, under certain provisions of the contract, to force payment for gas available but not taken.[23] The action of the state in forcing Permian to purchase, process and transport less gas from Phillips and more from Atlantic and others is so clearly unconstitutional as to require no citation of authority. This is especially true where, under the law of Texas prior to this case, the parties could contract with respect to their correlative rights in the absence of waste. *Railroad Commission v. Mackhank Petroleum Co.*, 186 S. W. (2d) 351, rev'd in part on another point, 144 Tex. 393, 190 S. W. (2d) 802; *Railroad Commission v. Humble Oil & Refining Co.*, 193 S. W. (2d) 824 (refused, n. r. e.), aff'd 331 U. S. 791, 67 S. Ct. 1522. It was stipulated during the trial of this case that no issue of waste was involved (R. 160-162). There was not the slightest justification or authority, therefore, for the Railroad Commission to redetermine and obliterate previously existing rights under private contracts negotiated at arms-length and in good faith. If the Railroad Commission is permitted, in the absence of legal justification, to rewrite gas purchase contracts between in-

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23 On the other hand, if Permian does not comply with the order, it faces heavy penalties under the Common Purchaser Act, including possible loss of its permit to do business in Texas (See pp. E-3, E-4, Appendix E).

terstate pipeline companies and independent producers, then the constitutional guarantee preserving integrity of contracts is emasculated. This question is of such importance to the natural gas industry as to warrant this Court's most serious consideration.

It is submitted that the decision of the Court of Civil Appeals, reversing the District Court and upholding the orders of the Railroad Commission, fails to recognize the jurisdiction of the Federal Power Commission under the Natural Gas Act and the decisions of this Court defining such jurisdiction. Further, the decision below disregards fundamental constitutional prohibitions against impairment of the obligations of contracts and the taking of private property. The questions presented by this appeal are, therefore, substantial in nature and of prime public importance.

Respectfully submitted,

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May, 1958.

APPENDIX A

Judgment of the Court of Civil Appeals

This cause came on to be heard on the transcript of the record and same being inspected, because it is the opinion of the Court that there was error in the judgment. IT IS THEREFORE considered, adjudged and ordered that the judgment of the trial court be and same is hereby reversed and the injunctions dissolved and judgment is here rendered for appellants. It is further ordered that the appellee pay all costs in this behalf expended both in this Court and the Court below and that this decision be certified below for observance.

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APPENDIX B

Opinion of the Court of Civil Appeals

IN THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

No. 10,495

RAILROAD COMMISSION OF TEXAS and THE ATLANTIC REFINING COMPANY,
Appellants,

vs.

PERMIAN BASIN PIPELINE COMPANY,
Appellee.

AND

No. 10,496

RAILROAD COMMISSION OF TEXAS and THE ATLANTIC REFINING COMPANY,
Appellants,

vs.

PHILLIPS PETROLEUM COMPANY,
Appellee.

FROM DISTRICT COURT OF TRAVIS COUNTY, 98TH JUDICIAL DISTRICT, NOS. 105,696 and 105,615, HONORABLE CHAS. O. BETTS, JUDGE

These two cases, although not consolidated for trial, were tried together, have a common record, and involve some common questions of law and of fact, but each

case presents some questions of law and fact peculiarly affecting each separate case.

We shall endeavor to determine the questions as presented in each case in one opinion, with such explanations as may appear essential for an understanding of the issues raised by all parties.

The appeal is from final judgments of the court granting both temporary and permanent injunctions.

The judgment in the Permian case, in part, is:

> "The Court heard and considered the pleadings, the evidence and the argument of counsel in this action brought by Plaintiff Permian Basin Pipeline Company against the Railroad Commission of Texas, including the intervention therein of The Atlantic Refining Company and the cross-action filed by the Intervenor, The Atlantic Refining Company, against the Defendant the Railroad Commission of Texas, and is of the opinion (1) that the law and the facts are with the Plaintiff Permian Basin Pipeline Company, and it is entitled to recover judgment against the defendant Railroad Commission of Texas as hereinafter decreed; (2) that the law and the facts are with the Defendant Railroad Commission of Texas in the cross-action filed against it by the Intervenor, The Atlantic Refining Company, and that the Railroad Commission of Texas is entitled to judgment denying the Intervenor, The Atlantic Refining Company, any relief prayed for in its cross-action against the Defendant Railroad Commission of Texas, as hereinafter decreed; (3) that the Order of the Railroad Commission of Texas No. 8-34,332 dated November 1, 1956, and its Supplemental Order No. 8-34,421 dated November 15, 1956, are void, illegal and unauthorized by law; (4) that the en-

forcement of such void, illegal and unauthorized orders against the Plaintiff Permian Basin Pipeline Company would inflict irreparable injury and damage upon said Plaintiff, for which it would have no adequate remedy at law; and therefore that the Defendant Railroad Commission of Texas, together with the members thereof, and their agents, servants, and employees should be permanently enjoined from enforcing said orders; and (5) that the status quo in this case was the status existing immediately prior to the issuance of said two orders; that it is highly probable that said status quo will be disturbed if the enforcement of said orders is not temporarily enjoined pending the final outcome of any appeal therein; that by virtue of such fact and by virtue of the Court's conclusion that said orders are void, illegal and unauthorized, their enforcement should be so temporarily enjoined pending appeal; and that the bonds on file in support of the temporary restraining order are sufficient to protect the Defendants and the Intervenor from injury during the pendency of any appeal.

"THEREFORE, on the 7th day of January, 1957, it was ORDERED, ADJUDGED and DECREED by the Court as follows:

"(1) That the Plaintiff Permian Basin Pipeline Company have judgment against the Defendant Railroad Commission of Texas, composed of W. J. Murray, Jr., Ernest O. Thompson and Olin Culberson, setting aside and holding for naught the Order of the Railroad Commission of Texas No. 8-34,332 dated November 1, 1956, and its Supplemental Order No. 8-34,421 dated November 15, 1956;

"(2) That the Plaintiff Permian Basin Pipeline Company have judgment against the Defendant Railroad Commission of Texas, composed of W. J. Murray, Jr., Ernest O. Thompson and Olin Culberson, permanently enjoining said Defendants, their

agents, servants and employees from enforcing the aforesaid orders of the Railroad Commission of Texas, and further permanently enjoining said Defendants from in any way penalizing Plaintiff Permian Basin Pipeline Company, or inflicting any sanctions upon it for its failure to obey said orders; . . ."

The judgment in the Phillips case, in part, is:

"The Court heard and considered the pleadings, the evidence and the argument of counsel in this action brought by Plaintiff, Phillips Petroleum Company, against the Railroad Commission of Texas, including the intervention therein of The Atlantic Refining Company and the cross action filed by the Intervener, The Atlantic Refining Company, against the defendant, Railroad Commission of Texas; and the Court is of the opinion (1) that the law and the facts are with the Plaintiff, Phillips Petroleum Company, and it is entitled to recover judgment against the Defendant, Railroad Commission of Texas, as hereinafter decreed, and (2) that the law and the facts are with the Defendant, Railroad Commission of Texas, in the cross action filed against it by the Intervener, The Atlantic Refining Company, and that the Railroad Commission of Texas is entitled to judgment denying the Intervener, The Atlantic Refining Company, any relief prayed for in its cross action as hereinafter decreed.

"IT IS THEREFORE, on this 7th day of January, 1957, ORDERED, ADJUDGED AND DECREED (1) that the Orders of the Railroad Commission of Texas Nos. 8-34,332 and 8-34,421 of November 1 and November 15, 1956, respectively pertaining to the Puckett-Ellenburger reservoir in Pecos County, Texas, be set aside, and they are hereby set aside and held for naught, (2) that the Intervener, The Atlantic Refining Company, be, and it is hereby denied any recovery on its cross action against

the Defendant, Railroad Commission of Texas, and (3) that the Plaintiff, Phillips Petroleum Company, have judgment against the Defendant, Railroad Commission of Texas, composed of Chairman Wm. J. Murray, Jr., and Commissioners Olin Culberson and Ernest O. Thompson, permanently enjoining said Defendant, its agents, servants and employees, from enforcing in any way the aforesaid orders."

The orders complained of are as follows:

RAILROAD COMMISSION OF TEXAS
OIL AND GAS DIVISION

OIL AND GAS DOCKET NO. 126

#8-3a 514

IN RE: CONSERVATION AND PREVENTION OF WASTE OF CRUDE PETROLEUM AND NATURAL GAS IN THE PUCKETT-ELLENBURGER FIELD, PECOS COUNTY, TEXAS

Austin, Texas
November 1, 1954

SPECIAL ORDER
ADOPTING RULES AND REGULATIONS FOR THE PUCKETT-ELLENBURGER FIELD
PECOS COUNTY, TEXAS

WHEREAS, After due notice, the Railroad Commission of Texas held a hearing on September 22, 1954, on the application of Phillips Petroleum Company to consider the adoption of rules and regulations to govern the drilling, completion and operation of wells in the Puckett-Ellenburger Field, Pecos County, Texas; and

WHEREAS, From evidence adduced at said hearing, the Commission finds that the subject field was

discovered in July, 1952, and is currently developed with eight wells producing from the Ellenburger formation encountered at an approximate depth of 13,500 feet; that the average gross thickness of the reservoir is approximately 1500 feet; that the gas-water contact has been established at -11,900 feet; that there is a uniformity of pressure throughout the reservoir; that one well will adequately drain 640 acres; and

WHEREAS, From evidence submitted at said hearing, the Commission is of the opinon and finds that waste as the term is defined in the applicable statutes will take place in said field unless rules are adopted by the Commission for the prevention thereof, and that the following field rules are necessary to prevent such waste and to provide for a more orderly development and operation of said field.

NOW, THEREFORE, IT IS ORDERED By the Railroad Commission of Texas that effective October 11, 1954, the following rules in addition to such of the Commission's general rules and regulations as are not in conflict herewith, be and the same are hereby adopted to govern the drilling, completion and operation of wells in the Puckett-Ellenburger Field, Pecos County, Texas.

RULE 1: No gas well shall hereafter be drilled nearer than thirteen hundred twenty (1320) feet to any well completed in or drilling to the same reservoir on the same lease, unitized tract or farm, and no well shall be drilled nearer than six hundred sixty (660) feet to any property line, lease line or subdivision line; provided, however, that the Commission will, in order to prevent waste or to prevent the confiscation of property grant exceptions to permit drilling within shorter distances than herein prescribed whenever the Commission shall have determined that such exceptions are necessary either to prevent waste or to prevent the confiscation of property. When

exception to this rule is desired, application therefor shall be filed and will be acted upon in accordance with the provisions of Commission Statewide Rules 37 and 38, which applicable provisions of said rules are incorporated herein by reference.

The aforementioned distances in the above rule are minimum distances to allow an operator flexibility in locating a well, and the above spacing rule and the other rules to follow are for the purpose of permitting only one well to each proration unit.

In applying this rule the general order of the Commission with relation to the subdivision of property shall be observed.

RULE 2. The casing program of all wells hereafter drilled in said field shall include at least three (3) strings of pipe set in accordance with the following program.

(a) A minimum of nine hundred (900) feet of new or reconditioned surface casing with an original mill test of not less than one thousand (1000) pounds per square inch shall be set and cemented. Cement shall be by the pump and plug method, and sufficient cement shall be used to fill the annular space back of the pipe to the surface of the ground or the bottom of the cellar. Cement shall be allowed to stand a minimum of twelve (12) hours under pressure and a total of twenty-four (24) hours before drilling the plug. The casing shall be tested by pump pressure of at least one thousand (1000) pounds per square inch applied at the well head. If at the end of thirty (30) minutes the pressure shows a drop of one hundred (100) pounds per square inch, or more, the casing shall be condemned. After the corrective operations, the casing shall again be tested in the same manner.

(b) An intermediate string of casing consisting of a minimum of five thousand (5000) feet

of new or reconditioned pipe that has been tested to two thousand (2000) pounds per square inch, shall be run. Sufficient cement shall be used to fill the calculated annular space back of the pipe to at least as high as the bottom of the surface pipe. Cement shall be by the pump and plug method, and the cement shall be allowed to stand a minimum of twelve (12) hours under pressure and a total of twenty-four (24) hours before initiating tests or drilling the plug. The casing shall be tested by pump pressure of at least twelve hundred (1200) pounds per square inch applied at the well head. If at the end of thirty (30) minutes the pressure shows a drop of one hundred twenty (120) pounds per square inch, or more, the casing shall be condemned. After the corrective operations, the casing shall again be tested in the same manner.

(c) The producing or oil string shall be new or reconditioned pipe that has been tested to three thousand (3000) pounds per square inch, and shall be set no higher than the top of the producing formation. Cement shall be by the pump and plug method, and sufficient cement shall be used to fill the calculated annular space behind the pipe to at least as high as the bottom of the intermediate string of casing. Cement shall be allowed to stand a minimum of twelve (12) hours under pressure and a total of twenty-four (24) hours before drilling the plug or initiating tests. The casing shall be tested by pump pressure of at least fifteen hundred (1500) pounds per square inch applied at the well head. If at the end of thirty (30) minutes the pressure shows a drop of one hundred fifty (150) pounds per square inch, or more, the casing shall be condemned. After the corrective operations, the casing shall again be tested in the same manner.

RULE 3: The acreage assigned an individual non-associated gas well for the purpose of allocating allowable gas production thereto shall be known as a

gas proration unit, and such acreage may be claimed for each non-associated gas reservoir independently of any other reservoir. No gas proration unit shall contain more than six hundred forty (640) acres except as hereinafter provided; and no acreage shall be included in any proration unit formed or created subsequent to the effective date of this order and allocated to the well thereon unless the most distant boundary of such acreage shown to be included in such unit is within sixty-five hundred fifty (6550) feet of such well; provded that tolerance acreage of ten (10) percent shall be allowed for each unit so that an amount not to exceed a maximum of seven hundred four (704) acres may be assigned, and each unit containing less than six hundred forty (640) acres shall be a fractional proration unit. All such proration units shall consist of continuous and contiguous acreage which can reasonably be considered to be productive of gas.

Operators shall file with the Commission certified plats of their properties in said field, which plats shall set out distinctly all of those things pertinent to the determination of the acreage credit claimed for each well; provided that if the acreage assigned to any proration unit has been pooled, the operator shall furnish the Commission with such proof as it may require as evidence that interests in and under such proration unit have been so pooled.

RULE 4: (a) The daily allowable production of gas from individual gas wells completed in the Puckett-Ellenburger Gas Field, as herein defined, shall, after deductions have been made for those walls incapable of producing their allowables as determined hereby, be determined by distributing the remaining total field daily allowable production among the remaining wells in the field in the ratio that the product of the gross acre feet assigned to the well for allocation purposes and the reservoir pressure of the

well bears to the summation of this product with respect to all other such gas wells in the field.

(b) Gross acre feet as used herein shall be the total gross acre feet of Ellenburger formation considered originally productive of gas underlying the acreage assigned to the gas well for allocation purposes.

(c) Reservoir pressure as used herein shall be the absolute pressure obtained at, or calculated to, the following depth: datum depth equal depth to the top of Ellenburger formation in the well bore plus one-half (½) of the quotient obtained by dividing the gross acre feet of formation assigned to the wall by the productive acreage assigned to the well.

RULE 5: (a) The reservoir pressure of each well in the Puckett-Ellenburger Field shall be determined not later than fifteen (15) days after the start of production for one or more of the legal purposes as set out in Article 6008, Section 7, Revised Civil Statutes of Texas, and shall be filed in duplicate with the Commission within ten (10) days after completion of such test. The effective date of the reservoir pressure for allowable purposes shall be the date of first gas production provided the test is taken and reported in accordance with the above time requirements, otherwise the effective date shall be advanced one day for each date the test is late.

(b) Annually, during the month of July, the reservoir pressure of each well shall be determined and filed in duplicate with the Commission within ten (10) days after completion of such test. The effective date of the annual reservoir pressure for allowable purposes shall be October first of each year or the date the test is received by the Commission, whichever is the later.

IT IS FURTHER ORDERED That this cause be held open on the docket for such other and further orders as may be necessary.

RAILROAD COMMISSION OF TEXAS

Ernest O. Thompson
Chairman

W. J. Murray, Jr.
Commissioner

Olin Culberson
Commissioner

(Seal)

ATTEST:

O. D. Hyndman
Secretary

CM:ms

RAILROAD COMMISSION OF TEXAS
OIL AND GAS DIVISION

OIL AND GAS DOCKET NO. 126

#8-34,332

IN RE: CONSERVATION AND PREVENTION OF WASTE OF CRUDE PETROLEUM AND NATURAL GAS IN THE PUCKETT (ELLENBURGER) FIELD, PECOS COUNTY, TEXAS

Austin, Texas
November 1, 1957

SPECIAL ORDER
AMENDING RULES OF PUCKETT (ELLENBURGER) FIELD, PECOS COUNTY, TEXAS, BY ADDITION OF RULE 6 TO PROVIDE FOR DETERMINATION OF RATABLE ALLOCATION OF PRODUCTION, SUSPENDING THE OPERATION OF THE BALANCING RULE FOR SAID FIELD, PROVIDING ADJUSTMENT FOR CURRENT ACCRUED OVERPRODUCTION AND UNDERPRODUCTION, DECLARING PERMIAN BASIN PIPE LINE COMPANY TO BE A COMMON PURCHASER OF GAS FROM ALL WELLS IN THE PUCKETT (ELLENBURGER) FIELD, AND ORDERING SAID COMMON PURCHASER TO TAKE RATABLY FROM ALL CONNECTIONS

WHEREAS, The Railroad Commission of Texas, after due notice and hearing by Special Order No. 8-30,514, issued effective October 11, 1954, promulgated and adopted field rules for the Puckett (Ellenburger) field, Pecos County, Texas, said rules being requested by Phillips Petroleum Company, and deemed necessary to assure prevention of waste and assure the adjustment of correlative rights and opportunities of each owner of gas in a common reservoir to produce and use or sell such gas as permitted by law; and

WHERAS, A subsequent hearing was called by the Commission with due notice given to all interested parties wherein the matter of adjustment of correlative rights and opportunities of each owner to produce and use or sell gas was the principle subject matter, it being shown by Houston Oil Company, an interested party, that its well was being excluded from ratable production by the Permian Pipe Line Company, the purchaser in said field, apparently because of alleged contractual obligations between said purchaser and Phillips Petroleum Company; and

WHEREAS, From evidence and testimony adduced at said hearing, it was apparent to the Commission that the rules in effect were being used through the cooperative efforts of Permian and Phillips to limit the use of the gathering and plant facilities solely to Phillips' production, except for trivial amounts that were taken at irregular intervals from the Houston well, that a change in regulation was necessary to assure protection of the correlative rights of the parties in said field, that upon representation of counsel for Phillips the Commission concluded (1) that said company was interested in ratable take of gas from all wells completed in a common reservoir, (2) that in all probability fictitious nominations and forecasts of demand for gas from said reservoir were causing nonratable take by the purchaser, (3) that there was a fixed demand, (4) that elimination of nominations and forecasts, and substitution therefor of a plant capacity figure for demand of gas from the reservoir would eliminate all fiction and allow ratable take by the purchaser; and

WHEREAS, From the evidence and testimony adduced at said hearing, including representations of counsel for Phillips, the Commission ruled March 1, 1956, that the field allowable be set at plant capacity; and

WHEREAS, After due notice, a hearing was held September 11, 1956, for the purpose of considering the application of Atlantic Refining Company, successor in interest to the Houston Oil Company pertaining to purchasing of gas by Permian Pipe Line Company in the Puckett (Ellenburger) Field, which application pertains to the same problem which was considered corrected by the March 1, 1956 order; and

WHEREAS, From evidence and testimony adduced at said hearing, it appears that the problem existing in the prior hearings; namely, the matter of adjustment of correlative rights and opportunities of each owner of gas in a common reservoir to produce and use or sell such gas, is still present, that the action taken by the Commission effective March 1, 1956, in no way altered nor affected the actions of Permian and Phillips in their exclusion of the Atlantic well from ratable production, that during the period from March 1, 1956, to September 1, 1956, the Atlantic well accrued 467,395 mcf of gas of underproduction, and that additional underproduction has been accrued since the last date mentioned, that all such underproduction plus underproduction of 471,003 mcf of gas which had accrued prior to March 1, 1956, and was cancelled by operation of an existing rule, was accrued to the detriment of Atlantic despite the admonition of the Commission that nonratable take was to be eliminated, that the accrual of such great amounts of underproduction was caused by the cooperative efforts of Permian and Phillips in excluding the Atlantic well from current production of allowables assigned by the Commission with the concurrent production of the full field demand for gas being taken from Phillips well only, thereby causing overproduction to accrue to the Phillips wells, that by skillful manipulation of wells' production Phillips successfully avoided shut down of said overproduced wells, while the Atlantic well

was subjected to cancellation of underproduction, that 471,003 mcf of cancelled underproduction has caused great loss to Atlantic, that continuation of operation of the field allowable and production in the present manner would cause cancellation of an additional 467,395 mcf accrued underproduction for the Atlantic well on March 1, 1957, that the condition existing in the field at present will be further confused and confounded by the completion of additional wells in said field belonging to interests other than the parties mentioned herein; and

WHEREAS, Phillips contended that actually in its operation it had violated no rule, that the facilities employed in gathering and processing the gas were lease facilities of Phillips, that the rules presently operative were those the Commission could by law adopt, that any deviation in determination and distribution of allowables would be contrary to statutory authority of the Commission; and

WHEREAS, Permian, through counsel, stated it had no interest in the matter of allocation of allowables, that it was nothing more than a purchaser from Phillips, that it considered the gathering system and plant facilities as being Phillips own facilities, but that under contract it had constructed the gathering system and plant facilities, owned the facilities, employed the personnel to operate the facilities, and had actual physical connection to the Atlantic well as well as the Phillips wells and in fact took trivial amounts of gas from the Atlantic well, that it proposed to enlarge the facilities at which time additional capacity could be made available to Atlantic, that a market was available to any other producer who, like Phillips, made the gas marketable, that Permian would take all such gas made marketable by any other operator in said field; and

WHEREAS, Phillips and Permian both contend that by contract between said parties, they had made

the gathering system and plant facility, though in fact owned and operated by Permian, a field facility of Phillips, and Phillips further contended that it could not be forced to apportion such facilities with any other producer in the same common reservoir, that any other producer had the duty to make their gas marketable as Phillips had done; and

WHEREAS, From evidence adduced at said hearing, the Commission finds:

(1) That the gas gathering facilities and processing plant operated by Permian in said field, contrary to the position taken by both Phillips and Permian, is an integral part of the Permian Pipe Line Company system, and that Permian is a common purchaser of gas at the wellhead from Phillips as well as from Atlantic.

(2) That Phillips and Permian by cooperative and concerted effort by virtue of a contract between said parties, have excluded the Atlantic well from its ratable share of the market demand for gas, as said ratable share was determined by the Commission in its administration of the rules for the subject field.

(3) That unless the regulation governing allocation of production and ratable take is adjusted to provide more rigid and equitable control said discrimination could probably continue with injury more widespread due to the increase in the number of producers and wells in said field.

(4) That by skillful manipulation of allowables and production with the use of the balancing rule, Phillips successfully avoided violation of the letter of any rule, yet it aided in exclusion of the Atlantic well from production by either encouraging or requiring Permian to take exclusively from its wells (as provided by contract) which is contrary to the intent of the proration and ratable take law.

(5) That Permian, possibly in error, considered the facilities used in gathering and processing the gas from said field to be Phillips facilities, and therefore not subject to apportionment to any other producer in the field, except with Phillips' consent.

(6) That the condition existent in the field is contrary to the intent of the law and the rules and regulations adopted thereunder for the adjustment of correlative rights and opportunities of each owner of gas in a common reservoir to produce and use or sell such gas as permitted by law; and

WHEREAS, After carefully considering the evidence adduced and all the record in this matter, the applicable law, and its own rules and regulations, the Commission is of the opinion that the following changes must be made in the regulation of the Puckett (Ellenburger) Field, so that discrimination as practiced therein may be eliminated.

NOW, THEREFORE, IT IS ORDERED By the Railroad Commission of Texas that effective November 1, 1956, that the rules for the Puckett (Ellenburger) Field, Pecos County, Texas, as adopted in Special Order No. 8-30,514, issued effective October 11, 1954, be and they are hereby amended by the adoption of the following additional rule:

RULE 6: (a) Allowables for gas wells in said field will be assigned by the Commission in accordance with the allocation formula described in Rule 4 hereof; said allowables to be shown on a Commission published schedule, as a schedule of percentage factors which will show each prorated wells' allowable in mcf of gas when multiplied by the total production of all prorated wells in the same reservoir. Factors will be shown for each possible condition of prorated and non-prorated wells and also the total reservoir production at which each change in condition will occur. The schedule of factors will be revised

by the Commission only when necessary. Non-prorated wells will be assigned as allowable the actual amount of their production; provided, that amount is less than the amount they would receive under the allocation formula. No well will be assigned an allowable greater than the gas production during the official twenty-four (24) hour test on the latest Form GWT-2. Underproduction, if and when accrued to incapable wells, will be reallocated to prorated wells.

An actual "MCF of gas" figure will be substituted for the percentage allowable figures for each well at a subsequent date, as soon as the actual reservoir gas production figures are available in the Commission Proration Department, and a schedule indicating the status of each well will be issued so that all interested parties may have available a record of gas production from the reservoir.

(b) Each common purchaser of gas connected to wells in said field is required to take ratably in accordance with the percentage allowable factors established by the Commission and is required to maintain all of the prorated wells connected to its facilities in substantially the same percentage status as to overproduction and underproduction. Each purchaser of gas from said field is required hereby to keep every other purchaser advised of his current market demand in order that each such party may be informed with regard to the applicable group of percentage allowable factors. Any well with an overproduced status greater than one hundred (100) percent of its average monthly allowable will be required to shut in until its status is again less than one hundred (100) percent. If the difference between the percentage status of wells connected to the same common purchaser of gas differs by an excessive amount the Commission may require wells with the greatest amounts of overproduction to be shut in until such wells are more nearly in balance.

(c) Under no circumstances will the allowable for the reservoir exceed that volume of gas that can be produced from each well therein without waste, such volume to be determined by the Commission, nor will the total monthly allowable exceed the amount produced from the reservoir during any certain month.

(d) Each common purchaser of gas in the Puckett (Ellenburger) field shall file accurate purchaser's nominations with the Commission by the twentieth (20th) of each month indicating the amounts of gas to be taken from said field during the succeeding month, so that each producer and the Commission will have available to it a reasonable forecast of demand for that month.

IT IS FURTHER ORDERED That the balancing rule stated as Rule No. 24(b) of the Conservation Rules and Regulations of Statewide Application and heretofore deemed applicable to the subject field is suspended from operation in said field unless and until further ordered by the Commission.

IT IS FURTHER ORDERED That the underproduction accrued by virtue of the abovementioned balancing rule to the Atlantic Refining Company, J. W. Robbins "A" No. 1 well and not cancelled by operation of said balancing rule at the effective date of this order is hereby perpetuated to be allowed as additional production in excess of an assigned daily allowable until such time as said underproduction has been produced, provided that said production in excess of daily allowable will be deducted from such of the Phillips Petroleum Company wells as are overproduced but only in such an amount and to the extent as the total of said wells overproduction, it being the intent of this order that the overproduction of the Phillips wells shall be balanced against the underproduction of the Atlantic well, and any excess overproduction, if such exists when under-

production is eliminated, will be cancelled to assure complete balance in the field insofar as accrued over and underproduction existent as of the effective date of this order.

IT IS FURTHER ORDERED That Permian Basin Pipe Line Company, purchaser of gas from the subject field, is declared by the Commission to be a common purchaser of gas from the field, that all facilities furnished for one producer will be furnished to all other producers so that each producer will be afforded the opportunity to produce and market without restraint his ratable share of gas as determined by the Commission, that it will be the duty of said common purchaser to comply with any regulation deemed advisable and adopted by the Commission to assure ratable take from said field.

It is the intent and purpose of this order that from and after November 1, 1956, the producers in said field and the common purchaser in said field will conduct their operations in such manner that takes from wells in said field will reasonably approximate the allowable assigned each of such wells so that each well will share ratably in the total field outlet, and operations to the contrary by any party will be adjudged in violation of Commission order and will be subjected to penalty action as provided by law.

IT IS FURTHER ORDERED That this cause be held open on the docket for such other and further orders as may be necessary.

RAILROAD COMMISSION OF TEXAS

W. J. Murray, Jr.
Chairman

Olin Culberson
Commissioner

Ernest O. Thompson
Commissioner

(Seal)

ATTEST:

O. D. Hyndman
Secretary

FY:an

"RAILROAD COMMISSION OF TEXAS
OIL AND GAS DIVISION
OIL AND GAS DOCKET NO. 126
#8-34,421

IN RE: CONSERVATION AND PREVENTION OF WASTE OF CRUDE PETROLEUM AND NATURAL GAS IN THE PUCKETT (ELLENBURGER) FIELD, PECOS COUNTY, TEXAS

Austin, Texas
November 15, 1956

SPECIAL ORDER
SPECIFYING THE MANNER AND AMOUNTS THAT GAS WILL BE TAKEN FROM ATLANTIC REFINING COMPANY AND PHILLIPS PETROLEUM COMPANY WELLS BY PERMIAN BASIN PIPE LINE COMPANY; SO THAT ACCRUED OVERPRODUCTION AND UNDERPRODUCTION IN PUCKETT (ELLENBURGER) FIELD, PECOS COUNTY, TEXAS, MAY BE ADJUSTED AS REQUIRED BY SPECIAL ORDER NO. 8-34,332, ISSUED EFFECTIVE NOVEMBER 1, 1956

WHEREAS, The Railroad Commission of Texas, after due notice and hearing, promulgated and adopted Special Order No. 8-34,332, issued effective November 1, 1956, for the Puckett (Ellenburger) Field, Pecos County, Texas, wherein, among other things, said order provided:

"IT IS FURTHER ORDERED That the underproduction accrued by virtue of the abovementioned balancing rule to the Atlantic Refining Company, J. W. Robbins "A" No. 1 well and not cancelled by operation of said balancing rule at the effective date of this order is hereby perpetuated to be allowed as additional production in excess of an assigned daily allowable until such time as said underproduction has been produced, provided that said production in excess of daily allowable will be deducted

from such of the Phillips Petroleum Company wells as are overproduced but only in such an amount and to the extent as the total of said wells overproduction, it being the intent of this order that the overproduction of the Phillips wells shall be balanced against the underproduction of the Atlantic well, and any excess overproduction, if such exists when underproduction is eliminated, will be cancelled to a complete balance in the field insofar as accrued over and underproduction existent as of the effective date of this order."; and

WHEREAS, The Railroad Commission of Texas, in its letter of transmittal, ordered:

"In addition, you will also make arrangements with Atlantic Refining Company and Phillips Petroleum Company to adjust your takes from the Atlantic and Phillips wells so that the underproduction of the Atlantic which has been perpetuated by said order will be eliminated within a reasonable time. If agreement is not reached with respect to this matter at an early date, the Commission will establish a rate of production for said wells."; and

WHEREAS, It has been evidenced to the Commission that Permian Pipe Line Company has not offered to comply with said order as of this time, nor has it responded to the Commission's advisory in any way so that the Commission can be assured that this matter is being adjusted as ordered.

NOW THEREFORE, IT IS ORDERED By the Railroad Commission of Texas that effective November 15, 1956, Permian Basin Pipe Line Company adjust its takes in the Puckett (Ellenburger) Field so that underproduction accrued to the Atlantic Refining Company's J. W. Robbins "A" No. 1 well will be made up by production in excess of daily allowable in the manner and at the rate prescribed as follows:

Underproduction accrued to said well will be produced at a rate of 8000 mcf per day, said production to be added to the rate allowed as prorated

production assigned to said well as its daily allowable.

Overproduction accrued to the Phillips' wells, namely, Evelynjo No. 1, Fisher "A" No. 1, Glenna "1" No. 1 and "2" No. 2, Odom "A" No. 1, Odom "C" No. 1, Odom "D" No. 1, Puckett "C" No. 1, Puckett "D" No. 1, Puckett "E" No. 1, Puckett "K" No. 1 and Puckett "L" No. 1, will be made up by restriction of production to less than each well's daily assigned allowable, the total amount of which will equal 8000 mcf per day, the makeup rate of each individual well to be that percentage of 8000 mcf that its overproduction bears to the total of all overproduction existing for such wells. (See Attachment "A" schedule attached showing each of such overproduced wells' status.) It is recognized by the Commission that adjustment in make up rate may be necessary when the final total overproduction and underproduction figures become available.

IT IS FURTHER ORDERED That the adjustment required by this order be inaugurated immediately.

IT IS FURTHER ORDERED That this cause be held open on the docket for such other and further orders as may be necessary.

RAILROAD COMMISSION OF TEXAS

W. J. Murray, Jr.
Chairman

Olin Culberson
Commissioner

.....
Commissioner

(Seal)

ATTEST:

O. D. Hyndman
Secretary

FY:sn

SCHEDULE OF AMOUNTS TO BE SUBTRACTED FROM THE DAILY PRORATED PRODUCTION OF PHILLIPS PETROLEUM COMPANY; OVERPRODUCED WELLS TO BALANCE THE ATLANTIC REFINING COMPANY, J. W. ROBBINS "A" NO. 1 WELL'S ADDITIONAL PRODUCTION OF 8000 MCFPD

Well	Overproduction As of September 1, 1956	Each Well's Percent of Overage	Each Well Part of 8000 MCFPD
Phillips Petroleum Company			
Evelynjo No. 1	-93736	17.37	1,390
Fisher "A" No. 1	-24636	4.57	366
Glenna No. 1	-89955	16.67	1,334
Odom "A" No. 1	-83184	15.42	1,234
Odom "C" No. 1	-31742	5.88	470
Puckett "C" No. 1	-47119	8.73	698
Puckett "D" No. 1	-100,359	18.60	1,488
Puckett "E" No. 1	-12831	2.39	190
Puckett "K" No. 1	-29212	5.41	433
Puckett "L" No. 1	-26777	4.96	397
Total:	-539,551	100.00	8,000

ATTACHMENT "A"
SPECIAL ORDER NO. 8
NOVEMBER 15, 1956

RAILROAD COMMISSION OF TEXAS
OIL AND GAS DIVISION
AUSTIN, TEXAS

NON-ASSOCIATED GAS PRORATION SCHEDULE—PUCKETT-ELLENBURGER
FIELD—PECOS COUNTY, TEXAS
EFFECTIVE NOVEMBER 1, 1956, UNTIL FURTHER ORDERED
BY THE COMMISSION

PARTICIPATION FACTORS

Operator and Lease	Well No.	Gross Acre Feet	BHP	Gross Acre Feet X BHP	GWT-2 Test	Factors if Daily Avg. Is Less 74,200 Mcf/Day	Factors if Daily Avg. Is Over 74,200 Mcf/Day
ATLANTIC REFG. CO.							
Robbins, J. W. "A"	1	960.00	6520	6,259,200	9115	.0877572	.097043
PHILLIPS PT. CO.							
Evelynjo	1	1024.00	6496	6,651,904	7000	.0932631	.103132
Fisher "A"	1	1024.00	6665	6,824,960	7100	.0956894	Non-prorated
Glenna	1	543.15	6688	3,632,587	7200	.0509307	.056320
Glenna	2	439.20	6611	2,903,551	7150	.0407093	.045017
Odom "A"	1	617.55	6602	4,077,065	7000	.0571625	.063211
Odom "C"	1	974.125	6690	6,516,896	7000	.0913702	.101039
Odom "D"	1*	308.85	4632	1,430,593	1128	Non-prorated*	Non-prorated
Puckett "C"	1	747.60	6626	4,953,598	7250	.0694520	.076801
Puckett "D"	1	1024.00	6576	6,733,824	7060	.0944116	.104402
Puckett "E"	1	976.35	6659	6,501,515	7000	.0911546	.100800
Puckett "K"	1	1024.00	6491	6,646,784	7100	.0931913	.103052
Puckett "L"	1	568.55	6654	3,783,132	7000	.0530414	.058654
Robbins "A"	1	896.80	6511	5,839,065	7200	.0818667	.090529

*Well limited to actual production and exempt from shut in pressure requirements.

Puckett-Ellenburger Field
November, 1956
JSC:E

District 8"

No findings of fact or conclusions of law were filed by the court.

The orders have the effect of prorating the production of gas from the Puckett-Ellenburger field, by allocating such production among the gas wells therein upon the basis of gross acre feet of pay time reservoir pressure and of requiring the appellee (Permian) to purchase ratably from the operators in the field the gas so produced. The orders also provide for the "make up" by Atlantic, one of the appellants, of the underproduction that had occurred to the Robbins "A" No. 1 well that had not been cancelled on September 1, 1956, by operation of the State-wide balancing rule.

The appeal in the Permian case is founded on eleven assignments of error.

The first and second points are directed to the action of the court holding the orders invalid because of the contract Permian had with Phillips and Atlantic to purchase gas in the Puckett-Ellenburger field, and in holding that the Plant facilities used in removing the CO_2 from the raw gas are so private in nature as to prevent regulation of the use, production and purchase of the gas in the manner prescribed by the said orders.

The third is that there was no attempt to change Permian's private status to a public status, and fifth the orders do not reflect an attempt to impair the obligations of contracts; sixth, the orders, if enforced, would not deny appellee equal protection of the law; do not encroach upon the federal jurisdiction and would not be an undue burden on interstate commerce, and the

orders are not impossible to be complied with, and are not indefinite and uncertain, and finally that it was error for the court to grant both a temporary and permanent injunction, and the bond required was inadequate.

Appellants say that in the Phillips case that the orders do fix allowables in compliance with Section 12 of Article 6008, that the orders are not invalid because they allow Robbins "A" No. 1 well to make up underproduction, and such make up is authorized by Section 14 of Article 6008.

The Puckett-Ellenburger field was discovered by Phillips in July, 1952, and at the time of trial had 13 gas producing wells. The Robbins "A" gas well was completed in June, 1955, and was acquired by Atlantic in June, 1956. The Hammonds well was recently completed as a gas producing well.

The contract Permian has with Phillips, in part, is as follows:

> "III(a)-1-B. The purpose of the dedication of recoverable reserves of gas well gas under the Pecos Acreage is to make available to Permian recoverable reserves of gas well gas sufficient to deliver to Permian average daily volumes of gas well gas containing volumes of pipe line gas ranging from twenty-five million (25,000,000) cubic feet per day of such pipe line gas to one hundred twenty-five million (125,000,000) cubic feet per day of such pipe line gas. It is, therefore, understood and agreed that Phillips shall have the right to produce gas well gas from the Pecos Acreage and use such gas or sell such gas to others than Permian, so long as there shall be reserves of gas well gas, determined pursuant to Article XX, underlying the Pecos Acreage sufficient

to enable wells on such acreage, when fully developed to a density not to exceed one (1) well to six hundred and forty (640) acres, to produce and deliver to Permian during the remaining term of this contract, against a wellhead delivery pressure of eight hundred (800) psig, volumes of gas well gas containing volumes of pipe line gas equal to an average of one hundred and twenty-five million (125,000,000) cubic feet per day of such pipe line gas, but in no event shall Phillips be obligated to maintain a total recoverable gas reserve containing in excess of a volume equal to seven hundred fifty billion (750,000,000,000) cubic feet of pipe line gas less the total cumulative volume of pipe line gas delivered hereunder."

"III(a)-1-E. It is specifically understood and agreed by the parties hereto that the volumes of gas Phillips shall be obligated to deliver to Permian from the Pecos Acreage under the terms of this contract shall be limited to the volumes of gas which can be legally produced from such acreage in compliance with the statutes of the State of Texas and with the provisions, spirit and intent of all legal and valid proration laws, rules and regulations of any duly constituted authority governing allowable production of natural gas from such acreage or from the gas wells drilled thereon, less the volumes of gas excepted and reserved as provided in this contract."

"III(a)-2-A. In the event Permian shall have received a certificate which Permian shall have advised Phillips is acceptable to Permian as provided in Section 2 of Article II hereof, then, beginning on December 1, 1953, Phillips shall sell to Permian and Permian shall purchase and receive, or pay for if not accepted, from the Pecos Acreage volumes of gas available for delivery hereunder up to a maximum daily average of twenty-five million (25,000,000) cubic feet of pipe line gas per day and Permian shall accept each day not less than a volume equal to ninety per cent (90%) of such average daily volume and ex-

cept as otherwise provided in this article not more than one hundred ten per cent (110%) of such average daily volume in any one (1) day."

"VII-3. The point of delivery for all gas well gas delivered to Permian hereunder from the Pecos Acreage pursuant to Article III(a) hereof shall be at the mouth of wellhead of the respective wells drilled on such acreage."

Permian is the principal purchaser of gas in the Puckett-Ellenburger field, and has purchased most of its gas from the Phillips wells, with a small amount from other operators, and thereby drained gas from beneath other leases.

Appellants take the position that in order to stop this practice that the Commission entered the orders limiting the production of each gas well to its fair share of the total gas produced therefrom and requiring the ratable purchase of such gas by appellee, Permian, under the power granted the Commission by Sections 10 and 12 of Article 6008 and under the provisions of the Common Purchaser Act. In 1954 the Commission adopted field rules allocating as production among the wells in the field upon the basis of the gross acre feet of pay assigned to each well multiplied by the reservoir pressure thereof.

Appellants contend that Phillips by dividing its proratable wells in groups and by under producing and over producing its groups of wells under the State-wide balancing rule then applicable to the field was able to take the market for gas, and cite as an example that from September, 1955, to October, 1956, the Robbins well produced 157,787,000 cubic feet of gas as a prorated field, whereas its share of actual production from prorated

wells during this period, determined by use of the Commission's allocation formula, was 1,328,030,000 per cubic feet of gas. That during this same period of time Phillips wells produced greatly such wells' share of the actual production from prorated well as determined by reference to the Commission's allocation formula.

The field outlet is approximately 44,000,000 cubic feet of gas wells gas per day, appellee Permian is the principal purchaser and takes approximately 42,000,000 cubic feet of gas per day (approximately 2,000,000 cubic feet of gas is taken by a small local market).

On September 20, 1955, the Commission on its motion held a hearing to consider what should be done to insure ratable production of gas in the field and upon a basis of this hearing the Commission fixed the field allowable at a figure equivalent to the capacity of Permian's plant, and later on entered the orders hereinabove set out.

In its order the Commission recited the Phillips claims that the plant facilities of Permian were lease facilities of Phillips, but the Commission found that the plant was an integral part of the Permian Pipeline Company system.

On February 8, 1952, Permian and Phillips entered into a contract for the purchase and sale of gas, a portion of which has been hereinabove set out. This contract was amended in January, 1953, to make it applicable to Phillips leases in the Puckett-Ellenburger field.

Permian entered into an agreement with Houston (Atlantic), much like the Phillips, and in part reads:

"Subject to the terms and provisions hereof, Seller agrees to sell and deliver to Permian and Permian agrees to purchase and receive from Seller, or if available and not taken, pay for that quantity of pipeline gas which will afford Seller ratable production over a reasonable period of time with other natural gas purchased by Permian in the vicinity of Seller's leases, computed under such equitable and reasonable formulae as Permian shall from time to time employ; provided, however, Permian shall not be required to enlarge the treating capacity of its existing carbon dioxide removal plant in excess of the present capacity of such plant prior to the time Permian would otherwise enlarge such capacity pursuant to the terms of the Gas Purchase Contract, dated February 8, 1952, as supplemented, between Permian and Phillips Petroleum Company; and, provided further, that Permian's obligations to take ratably hereunder shall be subservient to Permian's obligations to Phillips Petroleum Company, pursuant to said Contract; until said plant shall be so enlarged; and, provided further, that after Permian does enlarge such plant, Permian's obligations to take ratably hereunder shall cease to be subservient to Permian's said obligations to Phillips Petroleum Company and shall be equal to all other obligations of Permian with respect to such take."

Appellee, Permian, takes the position that the Commission found that Permian is a "Common Purchaser" of gas in the Puckett-Ellenburger field, and required it to furnish to all producers in the field, without discrimination, all facilities which it is furnishing to Phillips, and that this is the sole feature of the orders which directly affect it, and appellee says the said orders are illegal and void insofar as they declare it to be a "Common Purchaser" of gas in this field, and insofar as such orders direct it to make available to all producers in the

field its facilities, constructed and operated under the contract with Phillips, and make nine counterpoints to the effect that the orders affect only correlative rights and are in conflict with a valid contract concerning correlative rights, and an endeavor to convert appellee's carbon dioxide removal plant into a public utility, and seek to impair the obligations of contracts, and deny appellee equal protection of law, and constitute a burden on interstate commerce, and encroach on the jurisdiction of the Federal Power Commission, and such orders are impossible for appellee to comply with, and are too indefinite and uncertain.

Appellee Phillips contends that the orders are invalid because the Commission did not comply with the terms of Article 6008, and further that the orders are invalid because the Commission is without authority to require a sharing of the carbon dioxide removal plant between Phillips and Atlantic, and that the Texas Common Purchaser Statute does not authorize the Commission to regulate the plant as a utility, and finally that the orders are discriminatory.

The contract Phillips and Permian entered into is dated February 8, 1952, and was supplemented on January 22, 1953. On January 20, 1956, a further supplemental agreement was entered into, and these supplemental agreements are applicable directly to the gas field in Pecos County and make certain amendments to the first agreement, and we believe that excerpts from the supplemental agreements will be sufficient for a general understanding of the agreement and its relation to the issues in this case.

Permian built its plant and began to take gas from Phillips on February 18, 1954, with a capacity of 44 million cubic feet of raw gas per day.

The agreement dated January 20, 1956, provided that Permian would enlarge its plant by January 1, 1957, to provide for a treatment of 95 million cubic feet of raw gas per day. The plant was not completed as planned but it is expected that it will be completed in April, 1957.

During the first eighteen months of the operation of the plant Phillips was the only producer of gas in the field. April 26, 1955, Permian and Houston Oil Company entered into a contract whereby Permian would purchase gas. The terms of this contract are substantially the same as that between Permian and Phillips.

Section 1 of Article III of the contract provides that:

> "Subject to the terms and provisions hereof, Seller agrees to sell and deliver to Permian, Permian agrees to purchase and receive from Seller, or if available and not taken, pay for that quantity of pipeline gas which will afford Seller ratable production over a reasonable period of time with other natural gas purchased by Permian in the vicinity of Seller's leases, computed under such equitable and reasonable formulae as Permian shall from time to time employ; provided, however, Permian shall not be required to enlarge the treating capacity of its existing carbon dioxide plant in excess of the present capacity of such plant prior to the time Permian would otherwise enlarge such capacity pursuant to the terms of the Gas Purchase Contract, dated February 8, 1952, as supplemented, between Permian and Phillips Petroleum Company; and, provided further, that Permian's obligations to take ratably

hereunder shall be subservient to Permian's obligations to Phillips Petroleum Company, pursuant to said Contract, until said plant shall be so enlarged; and, provided further, that after Permian does enlarge such plant, Permian's obligations to take ratably hereunder shall cease to be subservient to Permian's said obligations to Phillips Petroleum Company and shall be equal to all other obligations of Permian with respect to such take."

Houston drilled the Robbins "A" well and began delivering gas to Permian's plant November 20, 1955.

Atlantic purchased certain property including the Robbins "A" well, and assumed Houston's obligations of the contract with Permian.

On September 11, 1956, the Commission held a hearing on a complaint made by Atlantic and on November 1, 1956, entered one of the orders under attack, which in part reads:

"IT IS FURTHER ORDERED That Permian Basin Pipeline Company, purchaser of gas from the subject field, is declared by the Commission to be a common purchaser of gas from the field, that all facilities furnished for one producer will be furnished to all other producers so that each producer will be afforded the opportunity to produce and market without restraint his ratable share of gas as determined by the Commission, that it will be the duty of said common purchaser to comply with any regulations deemed advisable and adopted by the Commission to assure ratable take from said field.

"It is the intent and purpose of this order that from and after November 1, 1956, the producers in said field and the common purchaser in said field will conduct their operations in such manner that

takes from wells in said field will reasonably approximate the allowable assigned each of such wells so that each well will share ratably in the total field outlet, and operations to the contrary by any party will be adjudged in violation of Commission order and will be subjected to penalty action as provided by law."

We do not believe that the orders are invalid and void but are within the power and authority of the Commission.

Section 10 of Article 6008 provides:

"It shall be the duty of the Commission to prorate and regulate the daily gas well production from each common reservoir in the manner and method herein set forth. The Commission shall prorate and regulate such production for the protection of public and private interests:

"(a) In the prevention of waste as 'waste' is defined herein;

"(b) In the adjustment of correlative rights and opportunities of each owner of gas in a common reservoir to produce and use or sell such gas as permitted in this Article."

Section 12 of Article 6008 is:

"It shall be the duty of the Commission to determine the status of gas production from all reservoirs in this state. If and when the Commission finds that waste exists or is imminent in the production of gas from any reservoir, or that the capacity of the wells to produce gas from any reservoir exceeds the market demand for gas from such reservoir, the Commission shall then proceed by proper order to prorate and regulate the gas production from such reservoir on a reasonable basis. On or

before the 20th day of each month, the Commission, after notice and hearing, shall determine (1) the lawful market demand for gas to be produced from each reservoir during the following month; and (2) the volume of gas that can be produced from such reservoir and each well therein during the following month, without waste. The Commission shall then fix the monthly reservoir allowable of gas to be produced from such reservoir at the lawful market demand therefor or at the volume that can be produced from such reservoir without waste, whichever is the smaller quantity. The monthly reservoir allowable shall be allocated among all wells entitled to produce gas therefrom so as to give each well its fair share of the gas to be produced from the reservoir, provided that each well shall be restricted to the amount of gas that can be produced from it without waste. The volume of gas so allocated to each well shall be regarded as the monthly allowable for such well. The daily market demand for gas, and the daily allowable, shall be determined by dividing the monthly demand and the monthly allowable by the number of days in the month."

The Common Purchaser Act, Section 8a of Article 6049a, reads:

"That in order to further conserve the natural gas resources of this State every person, association of persons, joint stock company, limited co-partnership, partnership, corporation, gas pipe line company or gas purchaser now, or hereafter, claiming or exercising the right to carry or transport natural gas by pipeline, or pipelines, for hire, compensation or otherwise within the limits of this State, or which is now engaged or shall hereafter engage in the business of purchasing, or taking, natural gas, or residue gas or casinghead gas shall be a common purchaser thereof, and shall purchase, or take, such gas under such rules or regulations as may be prescribed by the Commission, in the same manner, under the same

inhibitions against discriminations and subject to the same provisions as are herein set out with respect to common purchasers of oil."

It is to be observed that sections 10 and 12 of Article 6008 have as their objective ratable production, and the section 8a of Article 6049a, the Common Purchaser Act, seeks to insure ratable take.

Ratable production and ratable take or purchase are essential in preventing drainage between leases, and are related to the prevention of above-ground waste, because if a producer cannot share in the domestic full market, the operator will try to find some other market, one which might be inferior use of gas such as the manufacturer of carbon black.

Common Purchaser statutes are more vital to gas producers than to producers of oil since gas cannot be as readily stored as can oil, and is not transportable by truck.

The orders involved herein were adopted to bring about ratable production of gas in the field and the requirement that appellee as a common purchaser purchase ratably is for the purpose of insuring ratable production, and only require appellee to purchase ratably.

The contracts do not prevent exercise by the Commission of its authority; they expressly recognize that the Commission has such duty and responsibility to enter conservation orders and to fix allowables.

We do not believe that the contracts, if they relieve Permian of its duty to purchase ratably, are to that extent valid.

Lone Star Gas Co. v. Municipal Gas Co., 117 Tex. 331, 3 S. W. 2d 790.

We do not believe that the orders require Permian to make public use of private facilities, since the facilities used to remove the CO_2 content are part of its pipeline system, and the orders are supported by substantial evidence.

Appellee Permian has placed in its rate base the cost of constucting the facilities used by it to remove CO_2 from gas produced in this field. The Federal Power Commission in fixing the rates or charges for gas made by Permian may consider as a part of its rate base the cost of the facilities used by it to remove CO_2 from Puckett-Ellenburger gas.

In the Texoma Natural Gas Co. v. Railroad Commission (D. C., W. D., Tex.) 59 F. 2d 750, case the Court held that the Common Purchaser Act was invalid insofar as the operations of Texoma were concerned and insofar as the Commission's order sought to force Texoma to make new contracts of purchase from others. Texoma was transporting only gas produced from its own wells and was not purchasing gas from others.

We do not believe that the orders encroach upon Federal jurisdiction, and do not unduly burden interstate commerce, if enforced, and that the State has regulatory powers.

Interstate Natural Gas Co. v. Federal Power Commission, 331 U. S. 682; Federal Power Commission v. Hope Natural Gas Co., 320 U. S. 591; Cities Service Gas Co. v. Peerless Oil & Gas Co., 340 U. S. 179; Sinclair Pipe Line Co. v. Snyder (D. C., D. Kan.), 147 Fed. Supp. 632.

We do not believe that Phillips' contention that the orders are invalid because the Commission did not comply with the terms of Article 6008 is well taken.

Section 10, Subdivision (b), requires the Commission to prorate gas in the adjustment of correlative rights and opportunities of each owner of gas in a common reservoir to produce and use or sell gas as permitted in this Article.

> "The Commission shall be vested with a broad discretion in administering this law, and to that end shall be authorized to adopt any and all rules, regulations or orders which it finds are necessary to effectuate the provisions and purposes of said law." Section 22.

The record is very long in these cases and we have not attempted to review the evidence in detail. The orders themselves, based on the fact findings by the Commission, which we believe to be supported by the evidence, are self-explanatory.

We therefore believe that it was error for the court to hold the orders invalid.

The judgments are reversed and the injunctions dissolved and judgment here rendered for appellants.

Roy C. Archer, Chief Justice

Reversed and Injunctions
Dissolved and Judgment
Rendered.—Justice Hughes
disqualified, not sitting.

Filed: April 17, 1957.

Judgment of the District Court

No. 105,696

IN THE 98TH DISTRICT COURT
OF TRAVIS COUNTY, TEXAS

PERMIAN BASIN PIPELINE COMPANY

vs.

RAILROAD COMMISSION OF TEXAS, ET AL.

FINAL JUDGMENT

On the 20th day of December, 1956, there came on regularly for trial the above numbered and entitled cause which, by agreement of the parties and with the approval of the Court, was to be and was tried at the same time as cause No. 105,615, entitled Phillips Petroleum Company v. Railroad Commission of Texas, et al., and upon a common record thereof but not as consolidated cases;

And came Plaintiff, Permian Basin Pipeline Company by its attorneys, the Defendants, Railroad Commission of Texas, and the members constituting such Commission in their official capacity by their attorneys of record, the Intervenor, The Atlantic Refining Company by its attorneys of record and announced ready for trial. The Intervenor, George S. Hammonds, though his Petition in Intervention was this day filed with the Clerk of this Court did not appear either in person or by his attorneys; and thereupon, the Plaintiff, Permian Basin Pipeline Company, moved that the intervention of said Intervenor, George S. Hammonds, be stricken and that

he be dismissed from the case, which Motion the Court took under advisement.

Thereupon, a jury not having been requested, the case proceeded to trial before the Court and continued until 4:30 p.m., December 21, 1956, whereupon by agreement of the parties and with the approval of the Court the trial was recessed to January 7, 1957, at 9 o'clock a.m., and on January 7, 1957, at 9 o'clock a.m., trial was resumed of said cause. Whereupon the Intervenor, George S. Hammonds, again not having appeared either in person or by his attorneys, the Plaintiff Permian Basin Pipeline Company again moved to strike said intervention of George S. Hammonds, which said Motion was granted by the Court and the intervention is accordingly stricken and George S. Hammonds is dismissed as a party to this cause.

The Court heard and considered the pleadings, the evidence and the argument of counsel in this action brought by Plaintiff Permian Basin Pipeline Company against the Railroad Commission of Texas, including the intervention therein of The Atlantic Refining Company and the cross-action filed by the Intervenor, The Atlantic Refining Company, against the Defendant the Railroad Commission of Texas, and is of the opinion (1) that the law and the facts are with the Plaintiff Permian Basin Pipeline Company, and it is entitled to recover judgment against the defendant Railroad Commission of Texas as hereinafter decreed; (2) that the law and the facts are with the Defendant Railroad Commission of Texas in the cross-action filed against it by the Intervenor, The Atlantic Refining Company, and that the Railroad Commission of Texas is entitled to judgment denying the Inter-

venor, The Atlantic Refining Company, any relief prayed for in its cross-action against the Defendant Railroad Commission of Texas, as hereinafter decreed; (3) that the Order of the Railroad Commission of Texas No. 8-34,332 dated November 1, 1956, and its Supplemental Order No. 8-34,421 dated November 15, 1956, are void, illegal and unauthorized by law; (4) that the enforcement of such void, illegal and unauthorized orders against the Plaintiff Permian Basin Pipeline Company would inflict irreparable injury and damage upon said Plaintiff, for which it would have no adequate remedy at law; and therefore that the Defendant Railroad Commission of Texas, together with the members thereof, and their agents, servants, and employees should be permanently enjoined from enforcing said orders; and (5) that the status quo in this case was the status existing immediately prior to the issuance of said two orders; that it is highly probable that said status quo will be disturbed if the enforcement of said orders is not temporarily enjoined pending the final outcome of any appeal herein; that by virtue of such fact and by virtue of the Court's conclusion that said orders are void, illegal and unauthorized, their enforcement should be so temporarily enjoined pending appeal; and that the bonds on file in support of the temporary restraining order are sufficient to protect the Defendants and the Intervenor from injury during the pendency of any appeal.

THEREFORE, on the 7th day of January, 1957, it was ORDERED, ADJUDGED and DECREED by the Court as follows:

(1) That the Plaintiff Permian Basin Pipeline Company have judgment against the Defendant Railroad

Commission of Texas, composed of W. J. Murray, Jr., Ernest O. Thompson and Olin Culberson, setting aside and holding for naught the Order of the Railroad Commission of Texas No. 8-34,332 dated November 1, 1956, and its Supplemental Order No. 8-34,421 dated November 14, 1956;

(2) That the Plaintiff Permian Basin Pipeline Company have judgment against the Defendant Railroad Commission of Texas, composed of W. J. Murray, Jr., Ernest O. Thompson and Olin Culberson, permanently enjoining said Defendants, their agents, servants and employees from enforcing the aforesaid orders of the Railroad Commission of Texas, and further permanently enjoining said Defendants from in any way penalizing Plaintiff Permian Basin Pipeline Company, or inflicting any sanctions upon it for its failure to obey said orders;

(3) That the Intervenor, The Atlantic Refining Company, be and is denied any recovery on its cross-action against the Defendant Railroad Commission of Texas;

(4) That Plaintiff Permian Basin Pipeline Company have judgment against the Defendant Railroad Commission of Texas, composed of W. J. Murray, Jr., Ernest O. Thompson and Olin Culberson, and the Intervenor, The Atlantic Refining Company, jointly for all costs of court, for which execution may issue;

(5) That the Defendant Railroad Commission of Texas, composed of W. J. Murray, Jr., Ernest O. Thompson and Olin Culberson, and their agents, servants and employees, are temporarily enjoined from enforcing the

aforesaid orders of the Railroad Commission of Texas until such time as any appeal in this case is finally disposed of by the appellate courts of this state, and from in any way penalizing Plaintiff Permian Basin Pipeline Company or inflicting any sanctions upon it for its failure to obey said orders; and that the bonds heretofore given by Plaintiff in support of the temporary restraining order are hereby continued in force and effect in support of the temporary injunction granted herein;

(6) That any and all relief sought by any party hereto not expressly granted herein is denied.

To which judgment of the Court, the Defendant Railroad Commission of Texas, composed of W. J. Murray, Jr., Ernest O. Thompson and Olin Culberson, and the Intervenor, The Atlantic Refining Company, duly excepted in open court and gave notice of appeal to the Court of Civil Appeals for the Third Supreme Judicial District of Texas, at Austin.

ENTERED, ORDERED OF RECORD AND SIGNED on this the 18th day of January, 1957.

/s/ Chas. O Betts
C. O. BETTS
Judge Presiding

Article 6049a, Sec. 12, Vernon's Civil Statutes

Sec. 12. Any person or party at interest aggrieved by any order of the Railroad Commission of Texas under this Act, may have such order reviewed by proceedings in the manner prescribed by Article 6453, Revised Civil Statutes of Texas. The proceedings upon appeal shall be in like manner as prescribed by Article 6453, Acts 1930, 41st Leg., 5th C. S., p. 171, Ch. 36; Acts 1931, 42nd Leg., 1st C. S., p. 58, ch. 28.

APPENDIX E

Article 6049a, Sections 8, 8a, 8aa, 8b, 9, 11, 11b, 11d, 11e

Sec. 8. Every person, association of persons or corporation who purchases crude oil or petroleum in this State, which is affiliated through stock-ownership, common control, contract, or otherwise, with a common carrier, by pipeline, as defined by law, or is itself such common carrier, shall be a common purchaser of such crude petroleum and shall purchase oil offered it for purchase without discrimination in favor of one producer or person as against another in the same field, and without unjust or unreasonable discrimination as between fields in this State; the question of justice or reasonableness to be determined by the Railroad Commission, taking into consideration the production and age of wells in respective fields and all other proper factors. It shall be unlawful for any such common purchaser to discriminate between or against crude oil or petroleum of a similar kind or quality in favor of its own production, or production in which it may be directly or indirectly interested, either in whole or in part, but for the purpose of prorating the purchase of crude oil or petroleum to be marketed, such production shall be taken in like manner as that of any other person or producer and shall be taken in the ratable proportion that such production bears to the total production offered for market in such field. The Railroad Commission of Texas shall have authority, however, to relieve any such common purchaser, after due notice and hearing as hereinafter provided, from the duty of purchasing petroleum of inferior quality or grade.

Sec. 8a. That in order to further conserve the natural gas resources of this State every person, association of persons, joint stock company, limited co-partnership, partnership, corporation, gas pipe line company or gas

purchaser now, or hereafter, claiming or exercising the right to carry or transport natural gas by pipe line, or pipe lines, for hire, compensation or otherwise within the limits of this State, or which is now engaged or shall hereafter engage in the business of purchasing, or taking, natural gas, or residue gas or casinghead gas shall be a common purchaser thereof, and shall purchase, or take, such gas under such rules or regulations as may be prescribed by the Commission, in the same manner, under the same inhibitions against discriminations and subject to the same provisions as are herein set out with respect to common purchasers of oil.

Sec. 8aa. In addition to persons enumerated in Section 8, hereof, any and all other persons, association of persons, or corporations, operating any pipe line, which may now, or hereafter, purchase crude oil, petroleum, or natural gas in this State, whether they be common carriers or affiliated with common carriers or not, shall be a common purchaser of such crude oil, petroleum or natural gas, and shall purchase crude oil, petroleum or natural gas, offered it for purchase without discrimination in favor of one producer or person as against another as provided in Section 8 hereof.

Sec. 8b. It shall be the duty of the Railroad Commission of Texas to see that the provisions of this Act are fully complied with, and it shall have the power, after notice and hearing, to make rules, regulations and orders, defining the distance that extensions or gathering lines shall be made to all oil or gas wells; and such other rules, regulations or orders as may be necessary to carry out the provisions of this Act, and to prevent discrimination in purchases.

Sec. 9. The Railroad Commission of Texas shall have authority to make rules and regulations for the enforcement of the provisions of this Act.

Sec. 11. For the violation of any provision of this Act, or for the violation of any valid rule or regulation promulgated hereunder or any order passed by the Railroad Commission in pursuance of any such provision, rule or regulation, such person, association of persons, or corporation shall be subject to a penalty of not less than One Hundred Dollars ($100.00) nor more than One Thousand Dollars ($1000.00) for each offense recoverable in the name of the State in any District Court in Travis County, Texas, and each day of such violation shall constitute a separate offense. One half of such penalty may be recovered by and for the use of any person, association of persons or corporation against whom there shall have been an unlawful discrimination as herein defined, such suit to be brought in the name of and for the use of the party or parties aggrieved.

Sec. 11b. For any violation of any provision of this Act, or for the violation of any valid rule or regulation promulgated hereunder by the Railroad Commission in pursuance of such provision, by any foreign corporation, which is a common purchaser as defined herein, the Attorney General may bring suit in the District Court of Travis County for the purpose of cancelling the permit of such corporation and of enjoining and forever prohibiting such corporation from doing business in this State, and if adjudged guilty by the Court before whom the action is brought, the permit may be cancelled and the injunction may be granted, provided said cancellation and injunction shall be in addition to all other penalties.

Sec. 11d. The Railroad Commission shall make inquiry in each field concerning the connections of the various producers and when discrimination is found to be practiced by any common purchaser as defined in this Act the said Railroad Commission shall issue an order to such common purchaser to make such reasonable extensions of their lines and such reasonable connections as will prevent such discrimination.

Sec. 11e. The Railroad Commission shall, upon information that discrimination is practiced in its purchases by any common purchaser, request the Attorney General to bring a mandatory injunction suit against said common purchaser to compel such reasonable extensions as are necessary to prevent discrimination.

APPENDIX F

Natural Gas Act, Sections 1(a), 1(b), 2(6), 4(a), 4(c), 5(a), 7(c), 7(e)

Section 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest. [52 Stat. 821 (1938); 15 U.S.C. §717(a)]

Section 1. (b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. [52 Stat. 821 (1938); 15 U.S.C. §717(b)]

Section 2. (6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

Section 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural

gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

Secion 4. (c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

Section 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided*,

however, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

Section 7. (c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. §717f(c)]

Section 7. (e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exer-

cise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. §717f (e)]

APPENDIX G

U. S. Constitution, Article 1, Sections 8 and 10; Amendment XIV, Section 1

Article 1. Section 8. The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several states, * * *.

Article 1. Section 10. No State shall * * * pass any * * * Law impairing the Obligation of Contracts, * * *.

AMENDMENT XIV

Section 1. * * *. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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FILED
JUN 9 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 64

PERMIAN BASIN PIPELINE COMPANY,
a Corporation,
Appellant,

v.

RAILROAD COMMISSION OF TEXAS
and
THE ATLANTIC REFINING COMPANY,
a Corporation,
Appellees.

On Appeal From the Court of Civil Appeals for the Third Supreme Judicial District of Texas, at Austin

APPELLEES' MOTION TO DISMISS OR TO AFFIRM

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IN THE

Supreme Court of the United States

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No. .....

PERMIAN BASIN PIPELINE COMPANY,
a Corporation,
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RAILROAD COMMISSION OF TEXAS
and
THE ATLANTIC REFINING COMPANY,
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Appellees.

On Appeal From the Court of Civil Appeals for the Third Supreme Judicial District of Texas, at Austin

APPELLEES' MOTION TO DISMISS OR TO AFFIRM

Appellees move the Court for entry of an order dismissing the appeal or affirming the judgment below because no federal question of substance is presented. The only question presented, not a federal question, is whether the production of gas from a Texas gas field is to be prorated by the State of Texas or by an interstate carrier of natural gas. The challenged statute and orders are concerned

only with the ratable production of gas and not at all with the price at which it is sold. (R. 26-32; Jurisdictional Statement, Appendix E.)

Accompanying this motion is a supporting brief.

WHEREFORE, appellees pray that the appeal be dismissed or, in the alternative, that the judgment below be affirmed.

Respectfully submitted,

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Office Supreme Court, U.S.
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JUN 19 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. [redacted]

PERMIAN BASIN PIPELINE COMPANY,
a Corporation,
Appellant,

v.

RAILROAD COMMISSION OF TEXAS
and THE ATLANTIC REFINING COMPANY,
a Corporation,
Appellees.

On Appeal From the Court of Civil Appeals for the Third Supreme Judicial District of Texas, at Austin

BRIEF IN SUPPORT OF APPELLEES' MOTION TO DISMISS OR TO AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

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and THE ATLANTIC REFINING COMPANY,
a Corporation,
Appellees.

On Appeal From the Court of Civil Appeals for the Third Supreme Judicial District of Texas, at Austin

---

BRIEF IN SUPPORT OF APPELLEES' MOTION TO DISMISS OR TO AFFIRM

No federal question of substance is presented; the appeal is frivolous and should be dismissed or the judgment below affirmed. The question at issue, not a federal question, is whether the production of gas from a Texas gas field is to be prorated by the State of Texas or by an interstate carrier of natural

gas. As shown at pp. 6-10, *post*, the challenged statute and orders are concerned only with production and not at all with price.

I.

The challenged statute and orders do not conflict with any jurisdiction conferred upon the Federal Power Commission by the Federal Natural Gas Act.

For logical reasons we will consider first the local interests involved; but if the Court desires to be apprised immediately of the limited impact of the statute and orders, an impact having nothing whatsoever to do with federal jurisdiction, we call the Court's attention to what is set forth under the second subhead, pp. 6-10, *post*.

(1) *The purely local interests protected by the challenged statute and orders.*

It is common knowledge that the market for oil or gas lies in the field; is supplied by the pipeline serving the field or by a purchaser affiliated with such pipeline. Left to its own devices the pipeline or the purchaser affiliated therewith will effectively *prorate* the oil or gas from the field by determining from what producers, and in what relative amounts, oil or gas will be purchased by it.

As has been well said:

"For the independent producer, the pipeline performs a double function: It furnishes transportation at a cost much lower than railroad freight, and *it*

brings the market for crude oil directly to the producing property." (Economics of Pipe-Line Transportation in the Petroleum Industry, Joseph E. Pogue, p. 731.)

Years ago a member of the Railroad Commission of Texas* said this about the necessity for regulation of purchasers:

"Pipe lines prorate fields themselves. The reason is this: In most instances the company that owns the pipe line also purchases the oil in the field. Through the control of the pipe line you absolutely control the production, in the new fields, where only one pipe line is connected with the field. It costs a good deal of money to build another pipe line, unless there is a very large production, *and the individual producer, without the aid of the State, is wholly at the mercy of the pipe line."* (Hearings Before a Subcommittee of the Committee on Interstate and Foreign Commerce, 73rd Congress, part 4, pp. 1806-1807.)

While the foregoing has reference to the purchase of oil, it is equally applicable to the purchase of gas.

In the absence of regulation of purchasers the following evils may result:

(a) Monopoly may be created by the action of the purchaser in taking only its own production or the production of an affiliated corporation; or by purchasing from a favored group of producers only.

(b) Cross lease drainage of oil or gas may be caused. If the purchaser will take oil or gas from

* Hereinafter called the "Railroad Commission".

A but not from B, thereby allowing A to produce his wells while B's wells are shut in, oil or gas will be drained from beneath B's lease to A's lease.

(c) In an instance where oil production is involved, the producer who has no market will attempt to produce his oil and retain it in aboveground storage, thereby causing aboveground physical waste due to evaporation, seepage, *etc.* In the instance of gas production, the producer who has no market will be tempted to extract the liquid content from the gas and to flare the residue gas or to use the gas in the manufacture of carbon black or to make some other inferior use of it.

For consideration of these problems by this Court, see *Champlin Refining Co. v. Corporation Commission*, 286 U. S. 210, and *Thompson v. Consolidated Gas Co.*, 300 U. S. 55.

Insofar as the production of gas is concerned, the State of Texas has proceeded in three ways to prevent the above described evils. It has enacted legislation prohibiting the venting or flaring of gas and requiring gas to be used for certain purposes; and requiring the Railroad Commission to prorate the gas produced from each gas field "so as to give each well its fair share of the gas to be produced from the reservoir." Article 6008, *Vernon's Texas Statutes.** It has adopted the Common Purchaser Act, an Act requiring each purchaser of gas to purchase

* The last official codification of Texas statutes was made in 1925; and the statutes pertinent to the instant case were enacted after that date. Consequently, reference will be made to the unofficial publication used by the Texas courts.

ratably. Article 6049a, *Vernon's Texas Statutes.* (Jurisdictional Statement, Appendix E.)

The Common Purchaser Act complements the legislation requiring the Railroad Commission to prorate production of gas "so as to give each well its fair share of the gas to be produced from the reservoir." Since the producer may not flare his gas after extracting its liquid content; may not manufacture carbon black therefrom or make other inferior use thereof; and may not sell his gas for such use, a Railroad Commission order prorating production is of no benefit to the producer unless he can share in the market for gas that will be used for a permitted purpose, usually a fuel market. Consequently, the Common Purchaser Act, like legislalation requiring the Railroad Commission to prorate gas, has but one objective—to insure to each producer an opportunity *to produce* his fair share of the total gas produced from the field. And this objective is subsidiary to the primary goal of conserving the State's natural resources.

That statutes requiring purchasers to purchase ratably are in essence statutes *insuring ratable production* in the interest of preventing physical waste has been recognized by an eminent authority in the field of oil and gas law:

"Statutes making pipe line companies common purchasers of oil and gas are, in purpose and effect, *conservation* measures, and so operate, whether the production of oil or gas from a common source of supply is or is not restricted and prorated among the wells therein for the prevention of waste. Courts in most of the oil and gas producing states have held

that a state may validly legislate for the prevention of waste of oil and gas and for the protection of the correlative rights of owners and lessees in a common source of supply. Legislative enactments and judicial opinions have repeatedly stated that conservation measures and the orders and regulations of conservation agencies should be such as to afford the owner of each tract of land in a common source of supply of oil or gas the opportunity *to produce* his just and equitable share of the oil or gas therein and to use therefor his just and equitable share of the reservoir energy. Unless all the producers in a common source of supply have equal opportunity to sell or to transport oil and gas from their wells, they are not afforded the opportunity *to produce* their just and equitable share of the oil or gas or to utilize their just and equitable share of the reservoir energy. The purpose of the common purchaser statutes, and in some measure the purpose of the common carrier statutes, is to afford this opportunity." (4 Summers, *The Law of Oil and Gas*, perm. ed., Sec. 754, p. 182.)

It is almost self-evident that the Common Purchaser Act and any orders entered under it are directed at the regulation of *production* and with nothing else.

(2) *The limited scope of the Common Purchaser Act and of the orders of the Railroad Commission entered thereunder.*

The statute and orders of the Railroad Commission entered thereunder do *not*:

(a) Compel Permian Basin Pipeline Company* to purchase any gas, even one cubic foot thereof.

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* Hereinafter called "Permian".

(b) Compel Permian to purchase a specified quantity of gas if it should choose to purchase; Permian may purchase one million cubic feet per day or two hundred million cubic feet per day, as it chooses. It may purchase one million cubic feet today and forty million cubic feet tomorrow.

(c) Require Permian to pay a specified price for the gas it purchases. Neither the statute nor the orders of the Railroad Commission mention "price". The price paid for the gas by Permian has been fixed by the Federal Power Commission.*

The statute and orders merely require Permian to purchase *ratably* such gas at is chooses to purchase, at such price as has been or may be fixed by the FPC.

Permian contends that the Railroad Commission "may, by indirection, effectively require Permian to enlarge its Mitchell CO_2 plant by compelling it to purchase or take gas from other producers." (Jurisdictional Statement, p. 19.) This statement is incorrect. The statute and orders of the Commission do not require Permian to purchase even one cubic foot of gas; insofar as the statute and orders are concerned, Permian may daily purchase no gas, one cubic foot of gas or one billion cubic feet of gas. Since the size of Permian's plant is directly related to the amount of gas purchased by Permian and since Permian has absolute control over the amount of gas purchased by it, it is self-evident that the statute and orders of the Commission do not directly or indirectly compel Permian to enlarge its plant.

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* Hereinafter referred to as the "FPC".

Permian also asserts that under the Common Purchaser Act the Railroad Commission "can require Permian to extend its pipeline system to purchase or take additional supplies of gas from the producers." (Jurisdictional Statement, p. 19.) Since the orders of the Railroad Commission here involved do not purport to require Permian "to extend its pipeline system" there is no occasion for appellees to discuss the validity of a hypothetical order requiring such action by Permian.

Permian asserts that the orders of the Railroad Commission require it to purchase gas "without discrimination as to price." (Jurisdictional Statement, pp. 2, 6, 11.) This assertion has no basis whatsoever in fact; the prices paid by Permian are those that have been fixed by the FPC. The word "price" does not appear in the orders of the Railroad Commission and its orders have nothing whatsoever to do with the price Permian pays for the gas purchased by it.

Nor is the statute under which the Railroad Commission acted in any way concerned with "prices". It does require a common purchaser to purchase "without discrimination", and in instances where the FPC cannot exercise its price fixing jurisdiction, *e. g.*, in the instance of a sale of gas not going into interstate commerce, the price paid by a common purchaser to producers of gas in the *same* field presumptively should be the same. In this way "discrimination" in purchases would be avoided. But in instances where the FPC has jurisdiction the price fixed by the FPC controls.

And even in those instances where the FPC has no jurisdiction to fix prices, neither the statute nor the orders of the Railroad Commission fix the price to be paid by the purchaser. Such price is determined by the purchaser, it being logical to assume, with respect to intrastate gas, that the same price would be paid all producers in the *same* field, whether it be one cent per mcf or twenty cents per mcf.

Permian quotes the following from a brief filed by appellees in the Supreme Court of Texas:

"* * * The Common Purchaser Act requires the purchaser to take without discrimination, that is, to pay each producer in the same field the same price for the same kind of gas. Contracts to the contrary are invalid." *

What Permian fails to state is that such quotation had reference to purchases made by a common purchaser that is not subject to regulation by the FPC as to price. As to purchasers that are subject to the jurisdiction of the FPC appellees stated:

"For purposes of this case respondents admit that the price of the gas to be paid by Permian is subject to control by the FPC. We further admit for the purposes of this case that while it is inconceivable that it would do so, the FPC might fix one price to be paid for the gas purchased by Permian from Phillips and another price to be paid for the gas purchased

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* Respondents' Answer to Application for Writ of Error, p. 53.

by Permian from Atlantic. If the FPC did so there would be reasonable ground for the difference in price, with the consequence that Permian by complying with the orders of the FPC with respect to price would not be guilty of discrimination.

"The long and the short of the matter is that insofar as this case is concerned, the price to be paid for the gas by Permian has been fixed by the FPC; the Commission has not attempted to fix any price; all the Commission has done is order Permian to purchase ratably *at the price fixed by the FPC.*"*

Permian asserts that the Common Purchaser Act "contemplates and requires that the Railroad Commission *regulate the price* at which Permian now or hereafter purchases gas"; and that "it cannot be successfully disputed that the Common Purchaser Act contemplates and requires state enforcement of minimum prices." (Jurisdictional Statement, pp. 17, 18.) These assertions are not supported by anything in the statute, in the orders of the Commission or in the evidence. Insofar as the statute, orders and evidence are concerned, Permian is at liberty to pay for the gas purchased by it *any* price fixed by the FPC whether such price be one cent per mcf or one dollar per mcf. Moreover, if at any time the price paid Permian for the gas should not be subject to the control of the FPC, Permian would be perfectly free to set any price it desired. The statute and the Commission's orders are not concerned with minimum price or maximum price; are not concerned with price in any way whatsoever.

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* Respondents' Answer to Application for Writ of Error, pp. 84-5.

(3) *Since the challenged statute and orders merely control gas production and have nothing whatsoever to do with the price paid for gas by Permian, they operate in the field of jurisdiction expressly left to the States by the Federal Natural Gas Act.*

In an effort to insure each producer of gas from the field an opportunity to produce his fair share of the total gas produced therefrom, the Railroad Commission, proceeding under the provisions of Article 6008, *supra*, first adopted field rules allocating gas production among the various gas wells in the field upon the basis of gross acre feet of pay assigned to each well multiplied by the reservoir pressure thereof, admittedly an attempt to allow each fully developed lease to be produced in proportion to its gas reserves. (R. 22-4, 252.) If each gas well had produced the gas so allocated to it or the same proportion thereof and if Permian had purchased such gas, no inequity would have resulted.

But Permian chose to purchase from Phillips Petroleum Company* nearly all the gas purchased by Permian in the field. As a result, during the period from September, 1955, to October, 1956, Atlantic's Robbins "A" No. 1 well produced 157,787,000 cubic feet of gas as a prorated well; whereas, its share of *actual* production from prorated wells during this period of time as determined by use of the Railroad Commission's allocation formula was 1,328,030,000 cubic feet of gas. In other words, this well failed by 1,170,243,000 cubic feet of gas

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* Hereinafter referred to as "Phillips".

(1,328,030,000 cubic feet minus 157,787,000 cubic feet) to produce its share of the gas actually produced from prorated wells in the field. During this same period of time Phillips' wells actually produced an amount of gas that *exceeded* by 1,170,243,000 cubic feet such wells' share of *actual* production from prorated wells as determined by reference to the Commission's allocation formula. (R. 192-4, 199-200, 470.)

The 1,170,243,000 cubic feet of gas the Robbins "A" No. 1 well did *not* produce during the period from September, 1955, to October, 1956, would have yielded $70,214.58 if produced and sold at the price of six cents per mcf fixed by Permian. (R. 158, 181, 200-1, 288-9.)

During the foregoing period substantial quantities of gas were drained from beneath Atlantic's Robbins "A" lease to the leases owned by Phillips as the result of the production by Phillips of far more than its share of the gas produced from the field. (R. 249-254.)

To correct the intolerable situation above described the Commission entered the orders under attack. These orders correct the inequity in production (1) by *limiting* Phillips' production from its wells to a certain proportion, its fair share, *of the gas daily produced from the field,* which means in practical effect the gas daily purchased by Permian; and (2) by requiring Permian, if it purchases any gas, to purchase gas from *all* producers and to purchase such gas *ratably.* (R. 29-30.)

It will be noted that (1) and (2) reach the same end. If Permian desires to take gas, as it admittedly

does, and if Phillips' daily production is *limited* to a certain percentage *of the gas daily produced from the field*, Permian will be forced to purchase gas from the other operators in the field if it purchases from Phillips. Otherwise Phillips' daily production will not be a fixed percentage of *total* production. Basically, then, the issue presented is whether the Railroad Commission has the power to do what it has been doing for years in the gas fields of Texas—to so *prorate* gas production as to give each operator the opportunity to *produce* his fair share of the total gas produced from the field.

That the Natural Gas Act is concerned with *rates* or *charges*, 15 *U. S. C. A.*, Sec. 717c (a), and that the act is not concerned with local matters, such as production, is made plain by paragraph (b) of Section 717, reading:

"The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the *production* or gathering of natural gas."

In *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U. S 682, this Court said:

"* * * In denying the Federal Power Commission jurisdiction to regulate the production or gather-

ing of natural gas, it was not the purpose of Congress to free companies such as petitioner from effective public control. The purpose of that restriction was, rather, to preserve in the States powers of regulation in areas in which the States are constitutionally competent to act. Thus the House Committee Report states: 'The bill takes no authority from State commissions, and is so drawn as to complement and in no manner usurp State regulatory authority. . . .' Clearly, among the powers thus reserved to the States *is the power to regulate the physical production and gathering of natural gas in the interests of conservation or of any other consideration of legitimate local concern.*" (331 U. S. 690.)

Here the sole objective of the Railroad Commission's orders is *ratable production*. References to the Common Purchaser Act and to the purchase of gas are for the sole purpose, not of fixing the *price* for which the gas is purchased or of fixing the *amount* of gas that is to be purchased, but to insure ratable production. As shown above, the references to the Common Purchaser Act are in reality superfluous; the Railroad Commission eliminated the inequity in production by limiting Phillips' production from its wells to its fair share of the gas daily produced from the field. Those provisions in the orders requiring Permian to purchase ratably *do no more* than the provisions of the orders limiting the production from Phillips' wells.

Permian refers to the certificates of public convenience and necessity granted by the FPC to Phillips and Atlantic (Jurisdictional Statement, pp. 14-15), such certificates being required by the FPC of any producer selling gas to an interstate pipeline,

such requirements being based upon this Court's opinion in *Phillips Petroleum Company v. Wisconsin*, 347 U. S. 672. None of such certificates makes any reference to the *amount* of gas to be sold and purchased in the field. The certificates were granted pursuant to the filing with the FPC of the contracts under which the gas is sold, such contracts being filed as *rate schedules*. In this connection this quotation from the certificate granted Atlantic is pertinent:

"This authorization and the acceptance of the above *rate schedule* are without prejudice to such final disposition of the application for certificate as the record may require." (R. 348-9.)

In truth and in fact, the producers were required to obtain their certificates because of the jurisdiction conferred upon the FPC with respect to *rates*. The FPC has no interest in and has no jurisdiction over the *amounts* of gas purchased from the producers by Permian and has no interest in nor jurisdiction over the matter of whether Permian shall purchase ratably, that is, from all producers, or non-ratably.

The FPC is interested in one question and only in one question: Is the price Permian pays for gas produced from the Puckett-Ellenberger field and passed on to the ultimate consumer a fair and reasonable price? If it is, Permian may purchase from whom it pleases and in such amounts as it pleases. Permian has not pointed to and cannot point to any rule, regulation or order of the FPC indicating any intention to *select* the producers from whom Permian pur-

chases or any intention to fix the *amounts* of gas Permian purchases from each producer. That is a purely local matter left to the jurisdiction of the State of Texas acting through the Railroad Commission.

II.

The statutes and orders complained of do not deprive Permian of any rights guaranteed it by the Federal Constitution.

The contention that the statute and orders complained of deprive Permian of property and contractual rights in violation of the due process clause of the Federal Constitution is, if possible, even more frivolous than the contention that the statute and orders conflict with jurisdiction conferred upon the FPC by the Federal Natural Gas Act. *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U. S. 179. In that case this Court upheld orders of the Oklahoma Corporation Commission fixing a minimum wellhead price for gas taken from the Guymon-Hugoton field and directing Cities Service to take gas ratably from Peerless at the price fixed. In upholding these orders this Court stated that the "Due Process and Equal Protection issues raised by appellant are virtually without substance." (340 U. S. 185.)

Since the statute and orders here involved do not fix the price to be paid by Permian for the gas purchased by it but only compel Permian to purchase gas ratably, the attack against them is much more frivolous than the attack leveled against the orders

involved in the *Cities Service Gas Company* case. It is the element of price that distinguishes the *Cities Service Gas Company* case from *Cities Service Gas Company v. State Corporation Commission of Kansas*, Oct. Term, 1957, ... U. S. ....., 78 S. Ct. 381, a case in which the order of the Kansas Commission was struck down because it attempted *to fix price*, a matter within the jurisdiction of the FPC.

WHEREFORE, appellees pray that the appeal be dismissed or, in the alternative, that the judgment below be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1957

o———o———o

No. ~~994~~ 64

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PERMIAN BASIN PIPELINE COMPANY,
a Corporation,

Appellant,

v.

RAILROAD COMMISSION OF TEXAS and
THE ATLANTIC REFINING COMPANY,
a Corporation,

Appellees.

o———o———o

ON APPEAL FROM THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

o———o———o

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR TO AFFIRM

o———o———o

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June, 1958.

Law Briefs — OMAHA LINO-SLUG PRINTING CO., 418 So. 15th St.

In the Supreme Court of the United States

OCTOBER TERM, 1957

o———o———o

No. 994

o———o———o

PERMIAN BASIN PIPELINE COMPANY,
a Corporation,

Appellant,

v.

RAILROAD COMMISSION OF TEXAS and
THE ATLANTIC REFINING COMPANY,
a Corporation,

Appellees.

o———o———o

ON APPEAL FROM THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

o———o———o

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR TO AFFIRM

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Prior to a consideration of the question which Appellees in their Motion To Dismiss Or To Affirm and Brief in support thereof state to be the issue in this case—which, as will be shown, is not involved herein at all—Appellant desires to point out to the Court that much of Appellees' Brief concerns matters which are not even remotely connected with this case. *This case does not involve*:

1. Oil (Appellees' Brief, pp. 2-6). This case involves the sale in interstate commerce of natural gas for resale. Such sale is subject to the exclusive jurisdiction of the Federal Power Com-

mission. There is no comparable federal regulation of the sale of oil and, consequently, no conflict of federal and state regulation with respect thereto. All of Appellees' discussion, quotations and citations of authority concerning marketing of oil are, therefore, entirely irrelevant.

2. Monopoly and unlawful drainage in the purchase of gas (Appellees' Brief, pp. 3-4, 11-13). Every cubic foot of gas purchased by Appellant prior to the issuance of the Railroad Commission Orders under attack herein was purchased pursuant to contracts arrived at voluntarily and after good faith, arms-length bargaining. Monopoly and unlawful drainage are not an issue in this case and any allusion thereto by Appellees should be disregarded by this Court.

3. Conservation and waste (Appellees' Brief, pp. 4-6). By stipulation (R. 160-162) of the parties during the trial of this case it was agreed that the question of waste and, therefore, conservation, was not involved herein. The reference to and discussion of waste and conservation, as contained in Appellees' Brief, is academic and totally irrelevant to the issues in this case.

It is respectfully submitted that the above matters are not material to the issues in this case and that this Court should disregard all references thereto contained in Appellees' Brief.

I.

Appellees' Motion and Brief in support thereof state the question in this case to be "whether the production

of gas from a Texas gas field is to be prorated by the State of Texas or by an interstate carrier of natural gas." Of course, if this were the real question involved Appellant would not be engaged in this litigation, since it has never contended that a state does not have jurisdiction to regulate, *by proper means*, the physical aspects of the production of natural gas (Jurisdictional Statement, p. 14). Appellees' statement of the question involved assumes the very answer to be determined by this Court, namely, that under the facts as set forth in the Jurisdictional Statement filed herein, the Common Purchaser Act and the Orders of the Railroad Commission regulate only the physical aspects of the production of natural gas and not sales in interstate commerce of natural gas for resale.

Appellees state in their Brief (p. 6) that the statute (i. e., the Common Purchaser Act) and Orders of the Railroad Commission do not compel Appellant to purchase any gas. This statement is in direct contradiction of the mandate in both the statute and the Orders. Section 8aa of the Common Purchaser Act (Jurisdictional Statement, Appendix E-2) contains the explicit command that:

> "* * * any * * * persons * * * operating any pipeline, which may * * * purchase * * * natural gas in this State, whether they be a common carrier or affiliated with common carriers or not, shall be a common purchaser of * * * natural gas, and *shall purchase * * * natural gas, offered it for purchase without discrimination* * * *." (Emphasis added.)

The order appealed from, when read in conjunction with such statute, also leaves no room for doubt that Appellant must purchase any gas offered for sale. Such or-

der expressly declares (Jurisdictional Statement, Appendix B-20):

> "IT IS FURTHER ORDERED that Permian Basin Pipe Line Company, purchaser of gas from the subject field, is declared by the Commission to be a common purchaser of gas from the field, that all facilities furnished for one producer will be furnished to all other producers so that each producer will be afforded the opportunity to produce and market without restraint his ratable share of gas * * *."

In the light of these specific declarations, Appellees' protestations that such statute and Orders do not require Appellant to purchase gas are hollow indeed.

The principal contention throughout Appellees' Brief in support of their Motion is that the Common Purchaser Act and the Railroad Commission Orders issued thereunder are concerned *only* with the production of natural gas and concern not at all the purchaser or the conditions of purchase. If this were true, of course, there would have been no necessity for the issuance of the Orders against Appellant herein, *for it is not engaged in the production of natural gas.* Further, the plain wording of the Act itself is conclusive in respect to its intent and application. The regulation under the Common Purchaser Act is of purchasers and purchases (i. e., buyers and sales) not producers and the physical aspects of production. In this connection, Appellant desires to point out to the Court that there is no question of *intrastate* sales of gas involved in this case and that Appellees' numerous comments concerning the Railroad Commission's jurisdiction with respect thereto are wholly irrelevant and should be disregarded. The precise question herein concerns the state's authority to, in any man-

ner, regulate the sales to Appellant in interstate commerce of natural gas for resale.

Appellant admits that the Common Purchaser Act and the Railroad Commission Orders herein do not contain the word "price." This in no way detracts, however, from Appellant's position that such statute and Orders do in fact contemplate and require the Railroad Commission to regulate the price at which Appellant purchases gas in this field. That this interpretation is correct is conclusively shown by the construction placed on the Common Purchaser Act by the statutory three-judge Federal Court in *Texoma Natural Gas Co. v. Railroad Commission of Texas,* 59 F. 2d 750 (W. D. Texas, 1932), wherein such Act was held unconstitutional. In such case, the Court held (59 F. 2d 754):

> "The act directs the common purchaser to buy gas when offered for sale by others, but is silent as to the price to be paid, and all other essentials are left to conjecture."

It is interesting to note that Appellees have studiously avoided any reference to the *Texoma* case in their Brief. This is easily understandable since the Court in that case concluded that the Common Purchaser Act contemplated and required the Railroad Commission to fix the price and other terms and conditions for the sale of gas to a common purchaser. Such decision held the Common Purchaser Act unconstitutional even before enactment of the Natural Gas Act where price and other terms and conditions of purchases and sales, as here in issue, were brought within the exclusive jurisdiction of the Federal Power Commission. Appellant urges this Court's serious consideration of the opinion in the *Texoma* case and respectfully submits that such case provides a complete

answer to Appellees' argument respecting regulation of price.

II.

Appellees' Brief (p. 16) dismisses Appellant's claimed infringement of private property and contractual rights with the sweeping declaration that it is "even more frivolous" than the alleged conflict of federal and state regulation. This assertion, together with the reference to *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U. S. 179, will not, however, provide the answer as to how a state can, by mere declaration alone, convert a private interstate pipeline company into a common carrier and rewrite gas purchase contracts between private parties. We must again reiterate that, in this case, waste, conservation or any other issue of public interest which would give the state a legitimate concern, are not involved. All acts complained of by Appellee, The Atlantic Refining Company, were done pursuant to contractual provisions which it freely and presumably in good faith agreed to. No citation of authority is required to sustain the proposition that a party cannot accept the benefits of a contract and at the same time reject the burdens thereof. In the absence of an overriding public interest, which in this case could only have been a matter of conservation of natural gas, a party to a contract is bound by his bargain, improvident though it may have been. Cf. *Federal Power Commission v. Sierra Pacific Power Company*, 350 U. S. 348, 76 S. Ct. 368.

WHEREFORE, Appellant prays that the Motion To Dismiss Or To Affirm be denied and that this Court take jurisdiction to determine the substantial federal questions presented by this appeal.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. [redacted] 64

PERMIAN BASIN PIPELINE COMPANY,
a Corporation,
Appellant,

v.

RAILROAD COMMISSION OF TEXAS
and THE ATLANTIC REFINING COMPANY,
a Corporation,
Appellees.

On Appeal From the Court of Civil Appeals for the Third Supreme Judicial District of Texas, at Austin

APPELLEES' REPLY TO APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR TO AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 994

PERMIAN BASIN PIPELINE COMPANY,
a Corporation,
Appellant,

v.

RAILROAD COMMISSION OF TEXAS
and THE ATLANTIC REFINING COMPANY,
a Corporation,
Appellees.

On Appeal From the Court of Civil Appeals for the Third Supreme Judicial District of Texas, at Austin

APPELLEES' REPLY TO APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR TO AFFIRM

Appellant attempts to give some substance to its claim that a federal question is presented by completely distorting the Common Purchaser Act and the orders of the Railroad Commission entered there-

under. Appellant asserts that the statute and orders "compel Appellant to purchase . . . gas" (p. 3) and that the statute and orders "in fact contemplate and require the Railroad Commission to regulate the price at which Appellant purchases gas in the field" (p. 5). Neither assertion is correct; appellant simply attempts to rewrite the statute and orders of the Commission in an effort to bolster its case.

Appellant is not required to purchase gas in the Puckett-Ellenberger field. The Railroad Commission here states, as it has always stated, that appellant may cease purchasing gas tomorrow.

Moreover, if appellant chooses to purchase gas from the field it may purchase such total amount of gas as it desires to purchase and no more, provided only that it purchases ratably. The Railroad Commission here states, as it has always stated, that it has no power to force Permian to purchase any specified total amount of gas.

The "price" that Permian pays for the gas it takes from the Puckett-Ellenberger field has been fixed by the Federal Power Commission. The Railroad Commission here states, as it has always stated, that it has no authority to fix the price paid by Permian for the gas that it purchases.

The only power the Railroad Commission has sought to exercise here is the power to insure ratable production in the field by requiring Permian to take ratably from all producers in the Puckett-Ellenberger field *such gas as it chooses to take, at the price fixed by the Federal Power Commission.*

It is self-evident from the foregoing that no federal question is presented.

Respectfully submitted,

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